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In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,
Petitioner,

vs.

METROMEDIA, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY, FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust Building
922 Walnut Street
Kansas City, Missouri 64106
(816) 221-2288
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Did the Court of Appeals violate the Seventh Amendment, the *Erie* doctrine, and the legion of cases by this Court demanding scrupulous adherence to this "fundamental" and "important" federal guarantee of jury trial of fact issues, by reversing outright the factual findings and unanimous verdicts of two different juries composed of 18 persons fairly chosen from cross sections of two different Missouri communities of Kansas City and Joplin, who, after two lengthy trials, found in favor of Petitioner on her common law fraud claim?

(a) Does not the opinion below improperly reweigh and reexamine factual evidence properly submitted to a jury, so as to violate Missouri substantive law on sufficiency of evidence for a submissible case, opinions by the Eighth Circuit itself and other circuits, and opinions by this Court as exemplified by *Mercer v. Theriot*, 377 U.S. 152 (1964), so as to require this Court to exercise its vital power of supervision to correct the error by reinstating Petitioner's jury verdict?

(b) In view of an apparent trend toward more liberal reexamination of jury factual findings in federal, district and appellate courts, as disclosed by research of this past year's published opinions, should not this Court restate for this case and all federal jury cases, the rule stated by this Court with respect to non-jury cases in *Anderson v. City of Bessemer*, ... U.S. ....., 105 S.Ct. 1505, 1512, that "appellate courts

must constantly have in mind that their function is not to decide factual issues *de novo*."*

2. Does *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) require a court to accept as conclusive factual findings made by a jury in a consolidated case with common legal and equitable issues involving the same parties?**

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*In the past year, federal appellate courts have reversed, on factual grounds, approximately 45.1% of all appeals from jury verdicts in civil cases.

**This issue is presented by the petition in *Bellisimo v. Westinghouse Electric Corp.*, No. 85-786.

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OPINIONS BELOW

The decision of the court of appeals is reported at 766 F.2d at 1205 (8th Cir. 1985), and is set out in the Appendix at A1-A33. The unpublished order denying rehearing is set out at A36. The district court's opinion of October 31, 1983, is reported at 572 F.Supp. 868 (W.D. Mo. 1983), and is set out at A39-A70. The order of the district court of February 7, 1984, is in the Appendix at A73-A74.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1985. A timely petition for rehearing was filed, which was denied on August 19, 1985. On November 14, 1985, Justice Blackmun entered an order extending the due date for the petition for writ of certiorari to and including December 17, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law.

Rule 38, Fed. R. Civ. P., provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Section 2072, 28 U.S.C., provides with regard to the Fed. R. Civ. P.:

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

STATEMENT OF THE CASE

Petitioner Christine Craft commenced this action in January, 1983 in the United States District Court for the Western District of Missouri, against her former employer, KMBC TV-9, an ABC affiliate owned during her employment by respondent, Metromedia, Inc. Trial proceeded in Kansas City July 25-August 8, 1983 on petitioner's claims of sex discrimination in violation of Title VII (42

U.S.C. §2000(e), *et seq.*) violation of the Equal Pay Act (29 U.S.C. §206) and common law fraud. Jurisdiction was invoked on the Title VII and Equal Pay Act claims under 28 U.S.C. §§1331 and 1343. Jurisdiction of the fraud claim was based on 28 U.S.C. §1332(a).

On August 8, 1983 a 6-person jury returned its verdict for petitioner on sex discrimination[1] and awarded her $375,000 actual and $125,000 punitive damages on her fraud claim, finding for Metromedia on the Equal Pay Act Claim. On October 31, 1983, the district court rejected the jury's recommended finding of sex discrimination, granted respondent's motion for new trial on the fraud claim and ordered, on its own motion, that the fraud retrial would be in Joplin before 12 sequestered jurors "to ensure the integrity of the jury." (A67). The Joplin jury also found for petitioner on her fraud claim, awarding $225,000 actual and $100,000 punitive damages. The district court denied Metromedia's motions for new trial and judgment n.o.v. (A74).

Petitioner asserted fraud because the station, in order to lure petitioner away from her news anchor position in California, falsely assured her in numerous pre-employment conversations that it was concerned only with her journalistic skills, and had no intention of attempting to make her over or change her by dictating her on-air appearance in matters of wardrobe and makeup. Petitioner alleged that once she began as co-anchor at KMBC, she was subjected to intentional discrimination on the basis of sex, being required, unlike male on-air personnel, to submit

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1. Because petitioner's claims of sex discrimination and fraud arose from the same nexus of overlapping operative facts, the jury sat as a Rule 39(c) advisory jury on the Title VII claim, and ultimately issued a general verdict in petitioner's favor.

to intrusive management regulation of her appearance, ultimately being removed from her position as co-anchor because of her sex.

Although many of the facts giving rise to this litigation were, and remain, in dispute, certain basic elements are not controverted. Before her employment by KMBC, petitioner was a television reporter/anchor in Santa Barbara, California, having previously held several other positions as a broadcast journalist. When respondent attempted to persuade her to take a position at KMBC, petitioner, who was not actively seeking any other employment, repeatedly insisted that she did not want, and would not accept, a job at KMBC if the station intended to make over her appearance or "change her into something she was not."

In response to petitioner's repeatedly expressed concerns, which emanated in part from petitioner's unpleasant experience with appearance requirements imposed on her in earlier employment for CBS Sports, KMBC officials made a number of verbal representations, the precise substance of which is in dispute, regarding how she would be treated. Undisputedly, however, KMBC officials never disclosed to petitioner that even before her employment they had begun to formulate plans with their media consultant to change petitioner's wardrobe and makeup styling, while expressly instructing the consultant not to disclose to petitioner the existence of those plans. Nor is there any dispute in the record that management never told petitioner of its always-extant belief that appearance was the number one criterion for a television news person at Channel 9, and that news director Ridge Shannon always believed that "having an attractive anchor was part of

the requirement for effective delivery of the news on Channel 9." (Tr. Vol. V at 119, 120).

According to petitioner, "from day one" management's "relentless" obsession was directed solely toward criticizing petitioner's supposedly asymmetrical face, her makeup deficiencies, the fact one eye was smaller than the other, her clothing selection and in requiring petitioner's attendance at "coaching" sessions on makeup, clothing and creating the "illusion of credibility" as preached by respondent's media consulting firm. Despite respondent's earlier assurances that Craft would be allowed to be herself, and that defendant had no intentions of changing her appearance because they liked her appearance, Shannon admitted he began criticizing Craft's appearance "from day one" of her employment and that he began working on her clothing and appearance from day one. (Vol. VI at 215, 230).

Media consultant Lynn Wilford, who testified Shannon had agreed—before Craft began work—that Craft's appearance "problems" would require a lot of work, was requested by Shannon to make an "emergency visit" to Kansas City on January 14, within 9 days of petitioner's debut, to work with weekend anchor Pam Whiting and Craft on their appearance problems. On "day one" Shannon told Craft one eye was too small, her jaw too square and her clothes did not look right. During her "emergency visit" of January 14, Wilford performed what the Court of Appeals described as the "ill fated" makeup application which Craft was forced to wear on air (A30, n.17), and gave Craft a detailed, specific "makeup analysis" containing directives by a woman Craft had never met. (A103-A106).

In January, 1981 Ridge Shannon ordered Craft to follow makeup and, clothing instructions given by the

consultants. Also in January, the media consultant took petitioner to Macy's for the purpose of choosing on-air clothing. In February, petitioner was sent to Macy's for clothes and began thereafter spending work time trying clothes on in front of the camera to be sent to the Dallas consultant for approval. In short, management's focus remained on petitioner's appearance "continuously" throughout her tenure.

In May, 1981, the consultant provided petitioner with a "four-week wardrobe" developed specifically for Craft per Shannon's direction, and Shannon ordered Craft to follow this buying strategy as closely as possible. In June, 1981, petitioner received her first "standards of performance" by which the station would evaluate and judge her work. The first two standards required (1) maintaining consistent makeup application and (2) not deviating from a dress calendar, both according to the approval of her two male supervisors, Shannon and vice-president Kent Replogle. By July, respondent was issuing detailed directives, including a mandatory "clothing calendar" from which petitioner could not deviate, which specified precisely what blazer, blouse and skirt or slacks petitioner was to wear each day, regulating for example, whether her necklace could consist of one string of pearls, two strings of pearls or a gold chain.

On August 14, 1981, respondent advised petitioner it had decided to remove her from her position as co-anchor. The reasons for the action were the subject of sharply conflicting testimony. Petitioner testified Shannon asserted she was being removed because the audience perceived she was "too old, too unattractive, and not deferential enough to men;" on the other hand, Shannon denied

having made that statement and asserted that Craft's appearance, wardrobe and verbal stumbling had created a communication barrier, and the audience perceived petitioner as a "buttinski". Respondent offered petitioner a position as reporter, but she declined the offer and returned to California, where she reassumed her previous position as co-anchor at station KEYT in Santa Barbara.

On appeal, the Eighth Circuit reversed outright petitioner's second unanimous jury verdict for fraud on the singular "narrow issue" (A28) of petitioner's asserted "failure of proof that [respondent's] statements of present intent were false when made." (A32). As noted in detail in petitioner's petition for rehearing (A75-A91), the Eighth Circuit made detailed findings of its own regarding the various disputed issues of fact bearing on the fraud claim, and in concluding KMBC had not misrepresented the terms of the proposed employment when the station hired petitioner. Petitioner appealed the trial court's adverse judgment on her Title VII claim, but the Eighth Circuit rejected her contentions and expressly refused to undertake the sort of fact-intensive analysis which had led it to reverse the jury's verdict. Compare the opinion's Title VII discussion (A11-A24), with the fraud portion. (A27-A31). Petitioner argued that the trial court's decision on her Title VII claim was inconsistent with the jury's verdict in the fraud claim. Since, however, the Eighth Circuit disagreed with the jury's verdict, it did not reach the issue of the extent to which that verdict, if sustained, would have controlled the resolution of her Title VII claim. Nor did the Eighth Circuit decide petitioner's claim that the trial court's first order of retrial was erroneous, thus requiring reinstatement of the Kansas City jury's $500,000 verdict.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE REPRESENTS THE HIGHWATER MARK OF A TIDE OF APPELLATE OVERREACHING THAT HAS, IN MANY CIRCUITS, LARGELY USURPED THE HISTORIC AND SACRED FACT FINDING AUTHORITY CONFERRED SOLELY ON CIVIL JURIES BY THE SEVENTH AMENDMENT; THUS, THIS COURT SHOULD GRANT THE WRIT TO RESTATE THE ESTABLISHED LINE OF DEMARCATION BETWEEN JUDGE AND JURY'S FUNCTION—WHICH WILL ENHANCE EFFICIENCY IN THE ADMINISTRATION OF JUSTICE AND RESTORE PUBLIC FAITH IN THE CERTAINTY OF EVERY PERSON'S CONSTITUTIONAL RIGHT TO CIVIL JURY TRIAL.

This Court's history as vigilant guardian of the constitutional right of all litigants to have a jury determination of factual issues is rich indeed. As this case starkly exposes, however, and as the following review of recent appellate decisions strongly suggests, unbeknownst to the citizenry and this Court, the constitutional right to a jury decision of fact issues in civil cases is being eroded, and the established history and binding precedent of this Court is being brazenly ignored to the point of obliteration, or relegation to a mere footnote in the history of constitutional jurisprudence.

Petitioner candidly acknowledges the danger that this case could be shrugged off as merely one isolated, individualized, fact-intensive injustice on a state law claim which —despite the widespread attention given the case—is un-

important in the larger scheme of cases which some feel this Court should review. Nothing could be further from the truth.

First, it is the overriding federal principle *in favor of* jury trials which has most often generated recent opinions by this Court safeguarding and reiterating such rights where state law, or the clash of legal vs. equitable issues raises an issue as to the first clause of the Seventh Amendment, which requires that "the right of jury trial shall be preserved." Of late, Mr. Justice Rehnquist has provided a most eloquent tribute to, and complete review of the "valued" and "fundamental" right to jury trial in civil cases in his dissent in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 337-356 (1979):

> maintenance of the jury as a fact-finding body *is of such importance and occupies so firm a place in our history and jurisprudence* . . . any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

(Emphasis added) *Id.* at 346. Justice Rehnquist's rich praise of "[t]he important federal policy favoring jury decisions of disputed fact questions," underscores the *general* importance of the issue in this case.

Moreover, this case focuses, not on the first clause of the Seventh Amendment, which "preserves" the right to have a jury trial, and has been the subject of more recent decisions by this Court, but instead reveals a grave constitutional problem of "reexamination" of facts tried by a jury—twice tried in this case. In the 40's, 50's and into the mid 60's, this Court repeatedly reversed wrongful factual reexamination of jury verdicts by appellate courts in literally dozens of cases—dominated by, but not wholly

comprised of, FELA and Jones Act cases.[2] Numerous other full opinions and *per curiam* reversals establish, however, that this Court's firm constitutional policy forbidding factual reexamination and weighing of evidence by appellate courts governs *all jury cases* in federal courts.[3] If there is any doubt, this case squarely raises the issue, and *cert.* should issue because, "A decision by the Supreme Court, clearly stating . . . the scope of the FELA and Jones Act cases, would be of helpful guidance to lower federal courts." 9 Wright & Miller, *Federal Practice and Procedure*: Civil §2526, p. 559.

This Court must wield its supervisory power to restore in jury cases what was restored to non-jury cases by *Anderson v. City of Bessemer City*, ... U.S. ....., 105 S.Ct. 1504 (1985), an end to "*de novo*" fact finding by appellate courts, with its resultant duplication of fact finding at "huge cost in diversion of judicial resources." *Id.* at 1512. This issue cries out for attention today to restore public confidence in the system, and faithfulness to the principle of *stare decisis*. One eminent commenator/lawyer once observed that this Court's supervisory jury guardianship in years past had resulted in "[l]ower court's, state and

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2. In general see 4 L. Ed. 2d 1787: *Supreme Court Review of Sufficiency of Evidence in Actions Under Federal Employers' Liability Act; Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (numerous cases cited by Justice Douglas); *Rogers v. Mo. Pacific R. Co.*, 352 U.S. 500 (1957) (and numerous cases cited therein); *Harris v. Pa. R. Co.*, 361 U.S. 15 (1959) (cases cited by Justice Douglas); *Gallick v. Baltimore & Ohio Rd. Co.*, 372 U.S. 108 (1963).

3. *Dick v. New York Life Ins.*, 359 U.S. 437 (1959) (life insurance case); *Continental Ore v. Union Carbide*, 370 U.S. 690 (1962) (antitrust); *Mercer v. Theriot*, 377 U.S. 152 (1964) (wrongful death); *per curiam* reversals: *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (1954) (verdict on life insurance policies); *Swafford v. Atlantic Coast Line R. Co.*, 350 U.S. 807 (1955) ($9,875 verdict for negligence under Florida law); *Union Trust Co. v. Eastern Airlines*, 350 U.S. 907 (1955) (wrongful death); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956) (negligence action).

federal, . . . leaving issues to juries today, when, even as recently as two or three years ago, they would have resolved them as matters of law."[4] *Certiorari* should be granted today, therefore, to emphasize—particularly in this patently and egregiously wrong usurpation of 2 juries—that this Court's long line of decisions on sufficiency of evidence for a jury question was not a mere quirk of history or a product of the personal proclivities of the Justices serving at the time. Rather, this Court's decisions represent the solemn, binding pronouncements of the law of the land.

The magnitude of the current erosion of the jury's constitutional position as fact finder, as exemplified most palpably by the instant case, is demonstrated by a single statistic.[5] In the last year the Federal courts of appeals have considered 233 cases in which a party challenged the correctness of a jury's verdict; the appellate courts reversed the challenged verdict, in whole or part, in 105 cases. Thus in fully 45.1% of these cases the appellate courts conducted their own unconstitutional reexamination of the evidence, disagreed with the verdict of the jury below, and substituted their view of the facts for that of the jury. In almost all of the 105 reversals, the district judge who presided at trial had sustained the very verdict with which the appellate court disagreed.[6] The appellate

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4. DeParcq, *The Supreme Court and the Federal Employers' Liability Act, 1958-1959 Term*, 44 Minn. L.Rev. 707 (1960); see also Arnold, *Professor Hart's Theology*, 73 Harv. L.Rev. 1298 (1960).

5. The statistics set forth in this section summarize results of the survey of Appellate decisions described in detail at pages A107-A128 of the Appendix.

6. The same is true here, yet magnified, inasmuch as during the course of *two* trials the same district judge whose sex-discrimination findings were found to be impervious to attack had ruled the evidence of fraud sufficient for the jury no less than 6 times.

reversal rate does not include cases in which a jury verdict was overturned because of purely legal issues, such as the correctness of jury instructions or the admissibility of evidence.[7]

This pattern of appellate fact finding would represent an intolerable disregard of the commands of the Seventh Amendment regardless of whether the burden of that constitutional infraction fell equally on plaintiffs and defendants alike. But the appellate courts have not reviewed with an equal degree of overzealousness verdicts favoring all parties. On the contrary, the courts of appeals have been far more likely to overturn a verdict if the jury found facts favorable to the plaintiff:

Reversal Rate By Party: All Cases

Jury Verdict In Favor Of	Reversal Rate[8]
Plaintiff	51.0%
Defendant	20.0%

The difference in reversal rates is even greater when commercial cases are excluded:

Reversal Rate By Party: Non-Commercial Cases

Jury Verdict In Favor Of	Reversal Rate
Plaintiff	57.9%
Defendant	12.5%

7. The appellate courts reversed jury verdicts in their entirety in 45 cases (19.3%), reversed jury verdicts in part in 38 cases (16.3%), and reversed jury verdicts on the ground that the amount of the verdict was excessive in 22 cases (9.2%).

8. This figure represents all three types of reversals referred to in note 7.

The possibility that these disparities could have occurred by chance is less than 1 in 10,000.[9] The differing treatment of verdicts for plaintiffs and defendants provides a striking confirmation of Justice Rehnquist's observation in *Parklane Hosiery v. Shore, supra,* 439 U.S. at 344 (dissenting opinion), that the Seventh Amendment was adopted because the framers knew that "[a] jury would reach a result that a judge either could not or would not reach."[10]

A more detailed examination of appellate decisions reveals that appellate judges have been particularly aggressive in reversing jury verdicts in certain types of cases:

Reversal Rate By Subject Matter: All Cases

Type Of Litigation	Reversal Rate
Constitutional	55.6%
Discrimination	52.6%
Personal Injury	40.5%
Commercial	37.3%

The disparity in reversal rates is even higher when the analysis is limited to cases in which the jury returned a verdict in favor of the plaintiff:

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9. This probability is calculated by applying a standard chi square test.

10. A special concurring opinion by Judge Garwood in *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89 at 101 (5th Cir. 1985) aptly explains the need for equal consideration of both parties in a civil jury case:

> The directed verdict-judgment n.o.v. standard can be seen either as a jurisdictional boundary—marking the division of power between judge and jury—or as a means to help ensure that judgments rest on factual truth. In neither perspective is use of a double standard appropriate. If we trust the jury as a decision maker, we must trust it to decide for either party. Otherwise we demean the jury which is so hallowed in our traditions and in our Constitution. . . . The whole concept of an independent judiciary and the rule of law as we understand it, and have understood it for centuries, is based on rules of general application evenhandedly applied.

Reversal Rate By Subject: Verdict For Plaintiff

Type Of Litigation	Reversal Rate
Constitutional	70.6%
Discrimination	55.5%
Personal Injury	48.3%
Commercial	35.9%

Verdicts in favor of defendants in constitutional cases were reversed, however, only 9% of the time. The practice of according juries greater deference in commercial cases, while regarding as particularly suspect a verdict that government officials had violated the Constitution, stands on its head the policy of the Seventh Amendment, which was intended above all as a "bulwark" against government "tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it may be added, *to that of the judiciary.*" (Emphasis added). *Parklane, Id.* at 343.

Not all circuits have indulged in this practice of appellate disregard of jury verdicts. The first and ninth circuits have been appropriately restrained in their review of jury fact finding, while the second circuit has been particularly aggressive in setting aside jury verdicts.[11]

11. Reversal Rate By Circuit

Circuit	Reversal Rate
Second	73%
Third	58%
Fourth	58%
Eighth	56%
Fifth	51%
District of Columbia	43%
Eleventh	35%
Tenth	31%
Sixth	26%
First	25%
Ninth	9%

(Continued on following page)

Because of variations in the number of decisions in each appellate court, undue weight should not be attached to the precise ranking of each circuit. Nonetheless, the wide variation in the reversal rates demonstrates the conflicting views of the circuit courts regarding the propriety of overturning jury verdicts. This conflict should be addressed and authoritatively resolved by this Court.

The practice of overturning jury verdicts in civil cases has become so widespread and accepted that the appellate courts rarely bother to pay even lip service to the extremely stringent constitutional and statutory standards such reversals are supposed to meet. The right to a jury trial in civil cases, and the attendant right against appellate re-examination of jury fact finding, are guaranteed by the Seventh Amendment, section 2072 of the Judicial Code, and Rule 38(a) of the Fed. R. Civ. P. As noted earlier, in numerous cases involving a variety of statutory and common law jury claims during the last century, this Court has emphasized that appellate courts are to overturn jury factual findings only in extreme and exceptional circumstances. Yet among the 105 appellate decisions reversing jury verdicts in the last year, however, petitioner could find only 5 incidental references to the Seventh Amendment,[12] scant references to any of *this Court's* decisions announcing the applicable legal stan-

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Footnote continued—

This table omits appeals in the Federal Circuit and the Emergency Court of Appeals, which decided only two and one such cases, respectively.

12. *Seventh Amendment references*:

Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89 (5th Cir. 1985); *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985); (also cites Rule 38(a)); *Bonjourno v. Kaiser Alum. & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1985); *Smith v. Shell Oil Co.*, 746 F.2d 1087 (5th Cir. 1985); *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1985).

dards, one oblique reference to Rule 38(a), and no references at all to 28 U.S.C. §2072.

It is inconceivable that the framers of the Seventh Amendment ever intended that a day would come when federal appellate courts could reexamine and reverse almost half of all civil jury verdicts attacked on appeal. The literal language of the amendment forbids such appellate action except under the very narrow circumstances permitted under common law in the eighteenth century. The framers understood that juries and judges often would disagree about the merits of civil cases, and adopted the Seventh Amendment to guarantee that where such differences arose the views of the jury would ordinarily prevail:

> Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community.

Parklane Hosiery Co. v. Shore, supra, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting). The present appellate practice, like the Vice-Admiralty courts denounced by the Declaration of Independence, subordinates to the personal views of a handful of judges, who, as noted by Justice Rehnquist are "permanently attached to the sovereign," the sense of justice of Seventh Amendment juries and of the community which those juries represent. *Id.* at 348-49.

Twice in recent years this Court has granted *certiorari* to delineate the limitations imposed by Rule 52 on appellate review of the findings of fact of a trial judge. *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504 (1985); *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). While the problem in those cases concerned only the allo-

cation of fact finding authority among Article III judges, the appellate practice exemplified by the instant case is an abuse of constitutional magnitude. Because violations of the Seventh Amendment, when they occur, are occasioned by the actions of federal judges, rather than executive or legislative officials, and thus can only be corrected by this Court, the Court possesses unique constitutional responsibility to supervise the manner in which the lower courts are reexamining jury verdicts. As noted, a generation ago, when lower court judges repeatedly were interfering with jury verdicts, this Court repeatedly granted *certiorari*—if only for a one line *per curiam* reversal—[13]to reinstate the decisions and prerogatives of civil juries. Today, when such judicial interference extends to jury verdicts in a wide variety of constitutional and statutory actions, *certiorari* is even more appropriate.

II.

THE CIRCUMSTANCES OF THIS CASE PRESENT PRECISELY THE SORT OF DISPUTED FACTUAL ISSUES WHICH THE SEVENTH AMENDMENT, THE DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT ITSELF, AND MISSOURI COURTS CONTEMPLATE SHOULD BE RESOLVED BY A JURY.

Space limitations prevent a point-by-point exposure of the instances in which the Court of Appeals unlawfully,

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13. Petitioner urges that plenary review is appropriate in this case. In any event, due to the wide exposure this case has garnered, and the widespread public knowledge of appellate reversal of facts found by two juries, the purposes of *certiorari* and the broad goal of consistent, evenhanded administration of justice would be well served even if this Court grants *certiorari* simply to issue a one-line reversal reinstating petitioner's Joplin verdict.

undeniably "finds facts" in utter conflict with evidence supportive of Craft which is—or should have been—binding on appeal. Petitioner's Petition For Rehearing And Suggestions For Rehearing En Banc (A75-A97) must be read with care, since is provides graphic, indisputable, transcript-annotated proof of this fatal error. *Mercer v. Theriot,* 377 U.S. 152, 156 (1964), *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444 (1959). The fact the Court of Appeals unabashedly reexamines and reweighs strictly jury issues fairly leaps from the opinion. Weighing conflicting evidence is strictly for the jury. *Cunning v. Cooley,* 281 U.S. 90, 94 (1930). Indeed, the opinion blatantly violates this Court's decisions, its own decisions, and Missouri law by explicit crediting of *respondent's* contradicted evidence. *Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949); *Dace v. ACF Industries, Inc.*, 722 F.2d 374, 376-77 (8th Cir. 1983), supplemented, 728 F.2d 978 (8th Cir. 1984); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 567 (8th Cir. 1967); *Bayne v. Jenkins,* 593 S.W.2d 519, 521 (Mo. banc 1980).[14]

The resolution of this case, according to the Court of Appeals, came down to inferences, i.e. whether conceded intent to change Craft's appearance allowed a permissible conclusion defendant intended to pursue a "makeover" or "substantial" changes—as those two terms were defined by the appellate court. Surely, defining and applying to the

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14. A singular, egregious revelation of the single-minded bias of the Eighth Circuit is that the initial opinion flatly quoted Craft for testimony given by news director Shannon. (A30). When petitioner led off with this revealing fact in her rehearing petition (A78-A79), the appellate court simply modified its opinion (A36-A37) by correctly attributing the testimony to Shannon—blithely ignoring the undeniable bias and improper reweighing and reexamining of evidence which had been chillingly exposed. See also the opinion's footnote 16 at A29, which refers, inexplicably, to evidence of *defendant's* key state of mind testimony, that had become—or should have become—"*irrelevant* upon appeal". *Lavender v. Kurn,* 327 U.S. 645, 652-53 (1946).

evidence the common words "substantial" and "makeover" used in the jury charge can only be for the jury based on its personal exposure to all the evidence. Not so, according to the Eighth Circuit. Unquestionably, as shown by direct and circumstantial evidence set out in detail in the Petition For Rehearing (and in the Court of Appeals opinion), a jury reasonably could have inferred that KMBC intended, at the very time it recruited Craft with contrary representations, to substantially change or make over her appearance.[15] The decision whether or not to draw such an inference was a matter for the jury. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944); *Pinken v. Frank*, 704 F.2d 1019, 1026 (8th Cir. 1983); *Allison v. Mildred*, 307 S.W.2d 447, 453 (Mo. 1957).

The critical portion of the Eighth Circuit's opinion reads like the factual findings of a district court judge after a bench trial. The appellate court credited the critical defense witnesses, resolved conflicts in the testimony in favor of the defendant, and drew the inferences least favorable to petitioner. (A28-A31). Although the Eighth Circuit opinion is prefaced with an obligatory acknowledgement of the importance of the jury, the substance of the

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15. As was properly raised in Petitioner's Petition For Rehead (A95, fn. 13), *Neely v. Eby Construction Co.*, 386 U.S. 317, 325 (1967), even the erroneous rendition of evidence in the appellate court opinion would justify submitting to the jury the alternative basis for fraud, under Missouri law, that respondent's representations were made "without knowledge of their truth or falsity." *Wilson v. Murch*, 354 S.W.2d 332, 339 (Mo. App. 1962). Or Craft may be entitled to reinstatement of the $500,000 Kansas City verdict, since the verdict director said nothing about "substantial changes" (of which the opinion finds petitioner's evidence lacking), but was framed in the terms, "intended no changes." For instruction errors, where petitioner could meet the sufficiency threshold (which the opinion itself establishes) petitioner is, at a minimum, entitled to a new trial. *Weade v. Dichmann Wright & Pugh, Inc.*, 337 U.S. 801 (1949); *F.&H. Investment Company, Inc. v. Sackman-Gilliland Corporation*, 782 F.2d 1050, 1055 (8th Cir. 1984).

opinion belies that *pro forma* introduction. On the Eighth Circuit's view of the evidence, the critical issue was what Craft and KMBC meant when they agreed that KMBC would not "make over" Craft's appearance. The court of appeals recognized that KMBC attempted to "make over" petitioner's clothes, but held that the agreement covered only facial makeup and hairstyling:

> [W]e believe that in her audition interviews with KMBC Craft was concerned essentially with her hair and makeup and not her clothing. (A30) (Emphasis added).

Putting aside that this appellate fact-finding is blatantly false as shown in the Petition For Rehearing (A81-A85), this passage in the Eighth Circuit's opinion is devoid of any pretense that the interpretation of the agreement was a matter for the jury, or that the evidence somehow compelled this particular interpretation. Indeed, because such appellate fact-finding was always disproved with contrary evidence in the record, the "factual finding" indulged by the Court of Appeals was impossible to make as a matter of law; because under the standard announced but ignored in the opinion itself, the evidence did not, in *any* respect "point all one way."

The subject matter of this case is one which makes it particularly likely, and inappropriate, that judges will disagree with the conclusions of a jury drawn from a cross section of the community here *two* completely disparate communities. A resolution of this case rested to some extent on assumptions about the point at which a broadcaster's tampering with the clothes and hairstyle of a female journalist become "substantial," unreasonable and "intrusive." Those assumptions would turn in part of

a *fact finder's* view of whether as a general matter an employer should be free to require female employees, not only to do their jobs competently, but also to wear clothes, makeup and hairstyles that strike the fancy of management officials. These are issues about which men and women differ frequently and, at times, vociferously. The purpose of the Seventh Amendment is to place the resolution of cases such as this in the hands of a jury which will reflect the diversity of public sentiment on related controversial issues. A jury representing a cross section of the community will differ in a variety of ways from the composition of the federal judiciary; with regard to sex, women will typically be close to half of any jury, while appellate judicial panels, as here, are frequently all-male. In light of the sensitive and controversial nature of the issues underlying this litigation, the appellate panel should have been, and was not, particularly reluctant to reconsider the verdict of the jury—particularly after two juries from two separate and different communities had engaged in the all-important deliberative process utilizing all the components of demeanor, credibility, community values and common sense which are the hallmark of the jury process and the minimum which must be preserved in the genuine fact-finding process.

III.

THIS COURT SHOULD AUTHORITATIVELY DECIDE WHETHER NON-JURY FACTUAL FINDINGS MUST BE CONSISTENT WITH JURY FINDINGS. WHERE OVERLAPPING ISSUES ARE TRIED IN THE SAME CASE.

Six years ago in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), this Court held that litigation of a factual issue in a non-jury trial would have binding collateral

estoppel effect in a later trial—even in the face of a Seventh Amendment demand for a jury trial in the later case. That is, the jury must accept as conclusive a prior factual finding by a judge in an equitable proceeding. The question presented by this case is the obverse of that in *Parklane*: whether a court in an equitable proceeding must accept as conclusive the prior factual finding of a jury.

In August, 1983, the first jury to hear this case sustained petitioner's fraud claim and, acting in an advisory capacity, recommended a finding that KMBC had violated Title VII by discriminating against petitioner on the basis of sex. On October 31, 1983, the district court directed a new trial of the fraud claim and, without awaiting the results of that retrial proceeded to resolve the Title VII claim, rejecting the original jury's recommendation and holding that KMBC had not engaged in unlawful discrimination.

By laying side-by-side the trial court's Title VII opinion, and the Eighth Circuit's decision regarding the fraud claim, it becomes clear that the critical factual issues are largely the same. Thus it is no wonder the Court of Appeals often misstated evidence in a manner unfavorable to Craft, since the district court opinion resolved *every* contested factual issue *against* plaintiff.[16]

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16. It is ironic that the Appeals Court admonishes Craft more than 25 times that the district court's factual sex-discrimination findings could not be disturbed, only to abandon all deference to the jury as fact finder, and the decision of this same district judge, who rejected defendant's arguments against submissibility of fraud at least six times over two lengthy trials. The Court of Appeals defies law and logic to hold that every aspect of Judge Stevens' memorandum order was impervious to attack—except his profoundly correct rulings that the motion for judgment n.o.v. should be denied. (A63; A74). This duplicity flies in the face of law requiring deference to the trial judge and his unique in-person knowledge on submissibility of evidence. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 447 (1959), *Melia v. Ford Motor Co.*, 534 F.2d 795, 799 (8th Cir. 1976).

The district judge's dismissal of the Title VII claim was based primarily on a finding which both juries necessarily rejected in sustaining the fraud claim—that petitioner wanted and agreed in advance to management control of her clothes and makeup (A43), and that KMBC only decided to interfere with these matters after it became dissatisfied with petitioner's work, rather than based on any present intent or plan that predated her employment, finding management proceeded "cautiously and gradually." (A58). The trial court's decision thus rested, at least in part, on premises squarely inconsistent with both jury verdicts on the fraud claim.[17]

Both the Second and Eleventh Circuits have held that, where legal and equitable claims overlap, "on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." *Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928, 934 (11th Cir.), *cert. den.* 104 S.Ct. 97 (1983); *see also Caputo v. United States Lines Co.*, 311 F.2d 413, 416 (2d Cir. 1963) ("The court must follow the verdict of the jury.").

Petitioner argued in the Eighth Circuit that the district court's decision on the Title VII claim should be reversed because it was inconsistent with the verdict of the jury.

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17. It is revealing on the command to weigh all evidence in the light most favorable to the jury winner that the appellate opinion sets out as "facts," both of these conclusions from the district court: (1) "Craft indicated some willingness to work on her appearance and dress." (A4). Craft testified at the fraud trial, "No I did not indicate that I would need help in those areas." (Vol. II at 143-44) (See A30-A31); (2) "In fact the record is basically uncontradicted as to the gradual increase in the intensity of the measures taken by KMBC in regard to Craft's appearance." (A31). Craft's testimony disproved this myth when she said management interference was "continuous" and "relentless" "from day one" until her removal. (Vol. I Pt. 2, 130-37, 171-72, 193) (See A87-A90).

The Eighth Circuit did not reach this issue, since the appellate panel reversed that jury verdict. (A32). Should *certiorari* be granted on question 1, we urge that it be granted as well on question 2, so as to permit a consistent disposition of these interrelated claims. The same issue regarding the scope of *Parklane* is now pending before this Court in *Bellissimo v. Westinghouse Electric Corp.*, No. 85-786.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY, FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust Building
922 Walnut Street
Kansas City, Missouri 64106
(816) 221-2288
Attorneys for Petitioner

85-1053

No.

Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,
Petitioner,

vs.

METROMEDIA, INC.,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY, FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust Building
922 Walnut Street
Kansas City, Missouri 64106
(816) 221-2288
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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APPENDIX

Christine A. CRAFT,
Appellee/Cross-Appellant,

v.

METROMEDIA, INC.,
Appellant/Cross-Appellee.

Nos. 84-1336, 84-1380.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 14, 1985.
Decided June 28, 1985.

Before LAY, Chief Judge, and McMILLIAN and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Christine Craft was reassigned from coanchor to reporter by KMBC-TV in Kansas City, Missouri, and as a result brought this action against the station's owner and operator, Metromedia, Inc. Craft alleged that she had been discriminated against on the basis of sex in violation of both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), and that she had been fraudulently induced into accepting the KMBC employment. The primary focus of the suit was KMBC's concern with appearance—whether the station's standards for on-air personnel were stricter and more strictly enforced as to females than as to males and whether the station misrepresented to Craft its intentions as to changing her appearance to persuade her to accept the anchor job. The district court[1] found against Craft on her Title VII sex discrimination claim and refused a new trial as to the jury verdict against her on her equal pay claim. The court, however, set aside as excessive the jury verdict in Craft's favor on the fraud claim and ordered a new trial. *Craft v. Metromedia, Inc.*, 572 F.Supp. 868 (W.D. Mo.1983). Craft appeals from these rulings while Metromedia appeals from the judgment on the jury verdict,

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1. The Honorable Joseph E. Stevens, Jr., United States District Judge for the Eastern and Western Districts of Missouri.

again in Craft's favor, in the second fraud trial. We affirm the Title VII and Equal Pay Act judgments against Craft but further conclude that she did not make a submissible case on her fraud claim and thus reverse the judgment against Metromedia on that issue.

Christine Craft commenced her television career in mid-1975 as a weeknight weather reporter at a small station in Salinas, California. After about a year and a half, during which she also worked as an announcer, reporter, and substitute sportscaster, she became the weekend weather anchor at a San Francisco television station. She spent a year there, again handling some additional news and substitute sports assignments.

Craft then was hired by Columbia Broadcasting System to host the "Women in Sports" portion of its network television program "CBS Sports Spectacular." At the network's behest she had her hair cut short and bleached blond. She was required to use black eyebrow pencil and dark red lipstick, and a CBS technician applied heavy makeup before every on-air appearance. "Women in Sports" was discontinued after thirty weeks, and Craft returned to California.

About a year later Craft resumed her television career as a reporter at a station in Santa Barbara, California. She remained there, also serving as coanchor of the late news and occasionally doing sports and weather, until December 1980, when she began work at KMBC.

KMBC, having slipped in its local news ratings, had determined to adopt the coanchor format used by its two major competitors in Kansas City. Furthermore, it had determined that, because of the perceived "coldness" of its anchor, Scott Feldman, the new position was to be filled by a female to "soften" its news presentation. The

station obtained tapes of a number of performers, including Craft, from Media Associates of Dallas. After studying these tapes, KMBC news director Ridge Shannon contacted Craft, among other individuals, to see if she was interested in auditioning for the job. Craft described her unpleasant experience at CBS and made plain that she was not interested if KMBC intended a "makeover" of her appearance. She continued to stress this point while in Kansas City for the audition, and Shannon and R. Kent Replogle, vice president and general manager of KMBC, assured her they planned no changes such as those at CBS. Shannon did mention that KMBC made some use of consultants, and Craft indicated some willingness to work on her appearance and dress.

Craft accepted the coanchor position at KMBC and at the station's request stopped in Dallas for a meeting with Lynn Wilford of Media Associates before reporting to Kansas City. She made her debut as coanchor on January 5, 1981, and the testimony is essentially uncontradicted that Shannon and Replogle immediately began having concerns about her clothing and makeup. Wilford came to Kansas City on January 14 to work with Craft on dress as well as on various aspects of her presentation technique. It was during this visit that Wilford for the only time applied Craft's makeup, and the results on the 6 p.m. news were so unsatisfactory that Craft was allowed to remove the makeup before the 10 p.m. broadcast.

In the following months Shannon continued to make occasional suggestions or criticisms as to certain articles of Craft's clothing, and Craft was provided with materials, including the book *Women's Dress for Success*, on wardrobe and makeup. Then, beginning in April, KMBC arranged for Macy's Department Store to provide clothing for Craft in exchange for advertising time. Craft was

assisted by a consultant from Macy's in selecting outfits. She would then return to the KMBC studio, try on the clothing, and appear before camera so tapes could be made to send to Wilford for review.

On May 19 and 20, 1981, Media Associates initiated some research of viewer perceptions of KMBC's newscasts by conducting four "focus group" discussions. By this technique groups of ten individuals viewed sample video tapes of local news programs and then gave their reactions in sessions moderated by a Media Associates representative. The response to Craft's appearance was, as summed up by the district court, "overwhelmingly negative." 572 F.Supp. at 873. When Replogle and Shannon met with Craft the following day to discuss this result, Craft at first wanted to be let out of her contract to return to California. Replogle, however, stated that management was ready to work with her to overcome the problems, and Craft ultimately agreed to cooperate. Thereafter, her wardrobe was more closely supervised, and the "clothing calendar"[2] then mentioned by Replogle was eventually instituted in late July or early August.

As a further follow-up, KMBC and Media Associates in late June conducted a telephone survey of some 400 randomly selected persons in the greater Kansas City viewing area. These persons were asked to respond to a questionnaire specifically drafted to pursue issues raised in the focus group discussions. For example in one segment the survey participants were asked to rank Craft in comparison with the female coanchors at KMBC's com-

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2. The "clothing calendar" was a calendar given to Craft showing in detail for each day the blazer, blouse, and skirt (or occasionally slacks) she was to wear. A note in one corner indicated that the appropriate accessory would be either a single strand of pearls or a single gold chain.

petitors in response to some fourteen statements, four of which dealt with "good looks" or the dress of and image of a "professional anchor woman." Craft came out trailing in almost every category. Media Associates' report on the results of this survey, which was conveyed to Shannon and Replogle on August 3, 1981, suggested that Craft was having an extremely adverse impact on KMBC's acceptance among Kansas City viewers. On August 13 Media Associates recommended that Craft be replaced, and KMBC, after initial resistance, agreed.

The next day Shannon told Craft she was being reassigned to reporter at no loss of pay or contractual benefits. He characterized the results of the research, in the language of the district court, as "devastating and unprecedented in the history of the consultants of Media Associates." 572 F.Supp. at 874. Craft states that Shannon also told her she was being reassigned because the audience perceived her as too old, too unattractive, and not deferential enough to men. Shannon, however, specifically denies making such a statement, and the district court believed his version of the conversation. *Id.*

After the weekend Craft sent a telegram to KMBC refusing to accept reassignment, and when further discussions failed to resolve the matter, she returned to Santa Barbara where on September 1, 1981, she commenced work as a coanchor at the television station at which she previously had been employed. This suit followed in four counts: the Title VII sex discrimination and the fraud counts, the allegation of violation of the Equal Pay Act based on the differential between Craft's and Scott Feldman's salaries, and an allegation of prima facie tort based on an intent by KMBC to injure Craft. This last count was abandoned during the first trial in Kansas City.

Following that first trial the district court rejected the findings of the advisory jury[3] on the Title VII sex discrimination claim and entered judgment for Metromedia on that issue. The district court found that KMBC required both male and female on-air personnel to maintain professional, businesslike appearances "consistent with community standards" and that the station enforced that requirement in an evenhanded, nondiscriminatory manner. 572 F.Supp. at 877-78. Any greater attention to Craft's appearance, the court concluded, was "tailored to fit her individual needs" and was necessary because of her "below-average aptitude" in matters of clothing and makeup. *Id.* at 878. The district court also found that Craft had not been constructively discharged because there was insufficient evidence that her working conditions had become so intolerable that she had no choice but to quit or that KMBC had intended to force her resignation. *Id.* at 879. Finally, the court concluded that the telephone survey conducted by Media Associates had not been discriminatory or designed to effect Craft's removal as co-anchor and that KMBC had reasonably relied on the survey results as the basis for the personnel change. *Id.* at 873-878-79.

As to the Equal Pay Act count, the district court upheld the jury verdict in favor of Metromedia and refused to grant Craft a new trial. It rejected her allegations of error in the jury instructions and in the exclusion of certain testimony and concluded that the weight of the evidence was not contrary to the jury's finding that Feldman's higher salary was based on permissible factors such

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3. There is no right to a jury trial in a Title VII suit *Harmon v. May Broadcasting Co.*, 583 F.2d 410, 410 (8th Cir. 1978). Advisory use of the jury is authorized by Rule 39(c) of the Federal Rules of Civil Procedure.

as his education in broadcasting, his greater experience in major television markets, and his established identity with Kansas City viewers.[4] *Id.* at 876, 879-80.

The district court, however, granted Metromedia a new trial on the fraud count. In a bifurcated procedure the Kansas City jury had found liability and awarded Craft $375,000 in actual damages and then, after additional instructions, had awarded her $125,000 in punitive damages. The court declared itself "firmly convinced" that the verdict was "excessive" and "the result of passion, prejudice, confusion, or mistake on the part of the jury." *Id.* at 881. In support it cited the "unprincipled" award of actual damages nearly double that requested by Craft in her complaint (and nearly four times the amount she asked for at closing argument), instructional errors as to wrongful discharge and in the implementation of the bifurcated damages submission, and the "incessant and overwhelming" publicity surrounding the case. *Id.* at 881-82. The district court ordered that the new trial on the fraud count be held in Joplin, Missouri, with the jury to be sequestered. *Id.* at 882.

On retrial the jury again found for Craft, awarding $225,000 actual and $100,000 punitive damages. After the district court denied motions for judgment notwithstanding the verdict and for another new trial, Metromedia filed this appeal and Craft cross-appealed from the adverse determinations on her Title VII and Equal Pay Act claims.

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4. Craft had also asserted the pay differential as an incident of sex discrimination in violation of Title VII, but the district court held that that claim was merely duplicative of the Equal Pay Act count and found the jury verdict dispositive. *See Orahood v. Board of Trustees of the Univ. of Ark.*, 645 F.2d 651, 654 n. 3 (8th Cir.1981) (defendant may not be held liable under Title VII when one of four affirmative defenses of the Equal Pay Act has been established); *see generally Washington County v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

I.

Craft's attacks on the district court's disposition of her Title VII sex discrimination claim are essentially factual, rather than legal as she contends. Her central position is that KMBC's appearance standards were based on stereotyped characterizations of the sexes and were applied to women more constantly and vigorously than they were applied to men. Her further contentions that the district court erred in finding certain grooming cases controlling and in allowing Metromedia to rebut her prima facie case with stereotypical customer preferences follow only if we accept her central factual position.

A.

As an initial matter Craft argues that, since her case was one involving direct evidence of discrimination, the district court erred in failing to shift the burden to Metromedia to prove by a preponderance of the evidence that it would have taken the challenged actions even in the absence of gender bias. *E.g., Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1557 (11th Cir.1983), *cert. denied,* ..... U.S. ....., 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984); *Lee v. Russell County Board of Education,* 684 F.2d 769, 774 (11th Cir.1982). The cases relied on by Craft, however, involved direct testimony of discrimination accepted by the trier of fact. *Bell,* 715 F.2d at 1557; *Lee,* 684 F.2d at 774-75. It is apparent that the district court did not accept any such testimony in this case. Thus, the burden-shifting rule for which Craft argues could have no application here, and we need not give further consideration to whether it should be adopted by this circuit. *See Clay v. Hyatt Regency Hotel,* 724 F.2d 721, 724 (8th Cir.1984) (no direct evidence that employer acted with a discriminatory motive); *see also Norcross v. Sneed,* 755 F.2d 113, 118 (8th

Cir.1985) (to same effect in handicapped discrimination suit under 29 U.S.C. § 794 (1982)).

In the alternative, Craft argues that she also established a Title VII violation through use of circumstantial evidence and inferences under the *McDonnell Douglas* pattern of proof.[5] The district court plainly considered whether KMBC's position was pretextual, which indicates that it reached its decision through this mode of analysis. On review, however, we need not discuss the record in terms of "prima facie case," "articulation of a legitimate, nondiscriminatory reason," and "pretext" but instead may look directly to the ultimate factual issue: whether the defendant intentionally discriminated against the plaintiff. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); *see Easley v. Empire Inc.,* 757 F.2d 923, 929-30 (8th Cir.1985). As the district court recognized, the burden of proof on this issue always remains with the plaintiff. *Craft,* 572 F.Supp. at 876-77 (quoting *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981)). A finding of intentional discrimination is a factual finding, *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), *cited in Anderson v. City of Bessemer City,*

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5. Under the analysis set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-45, 36 L.Ed.2d 668 (1973), after a party suffering an adverse employment action proves some set of facts—the "prima facie case"—sufficient to give rise to an inference that the employer was motivated by discrimination, the employer must then articulate a legitimate reason for the decision so as to dispel the inference of discrimination while finally the aggrieved party has the opportunity to show that the reason articulated was a pretext and that the employer actually was improperly motivated. *See generally Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

..... U.S. ....., 105 S.Ct. 1504, 1508, 84 L.Ed.2d 518 (1985), and the court found against Craft.

Finally, Craft argues that the district court erred in finding her claim of discrimination in employment conditions controlled by grooming cases such as *Knott v. Missouri Pacific Railroad,* 527 F.2d 1249 (8th Cir.1975). In *Knott* we held that appearance regulations making distinctions on the basis of sex will not support allegations of discrimination when the standards are reasonable and are enforced as to both sexes in an evenhanded manner. *Id.* at 1252. Again what Craft really contests is the district court's *factual* determination that KMBC's actions concerning the appearance of its on-air personnel fell within the *Knott* guidelines.

Because many of Craft's arguments boldly seek reevaluation of the evidence and rejection of the district court's factual findings, we make clear our limited standard of review in such cases. Factual findings may be set aside only when clearly erroneous. *See* Fed.R.Civ.P. 52(a). Our "foremost principle" is that " 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. City of Bessemer City,* ..... U.S. ....., 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)); *see Hoefelman v. Conservation Commission of Missouri,* 718 F.2d 281, 285 (8th Cir.1983). We may not duplicate the function of the district court by making our own determination of the facts and reversing if we believe we would have decided the case differently: "Where there are two permissible views of the evidence,

the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 105 S.Ct. at 1512; *Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 857-58, 102 S.Ct. 2182, 2190-91, 72 L.Ed.2d 606 (1982).

Furthermore, we have stated that the burden is on the objecting party to clearly demonstrate error in the factual findings. *Aetna Casualty & Surety Co. v. General Electric Co.,* 758 F.2d 319, 323 (8th Cir.1985); *Hunt v. Pan American Energy,* 540 F.2d 894, 901 (8th Cir.1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 778 (1977); *Reilly v. United States,* 513 F.2d 147, 150 n. 2 (8th Cir.1975). The evidence is to be construed in the light most favorable to the party prevailing below. *Tautfest v. City of Lincoln,* 742 F.2d 477, 481 (8th Cir.1984); *United Barge Co. v. Notre Dame Fleeting & Towing Service,* 568 F.2d 599, 602 (8th Cir.1978).

B.

We turn first to the most prominent factual element of Craft's case—her testimony that Shannon told her she was being reassigned because she was too old, too unattractive, and not deferential enough to men or because the audience perceived her as such. Shannon, however, specifically denied making that statement. The only additional evidence[6] was that of Feldman, who testified on

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6. Craft argues that the statement attributed to Shannon would be consistent with the survey results and the station's interpretation thereof; however, no questions on the survey dealt with age, and Craft actually was rated lowest among her female counterparts as to the *strength* "does not play second fiddle' to male anchor. The testimony of Brenda Williams that Shannon told her Craft was being removed because people didn't like her appearance is basically consistent with what the district court found Shannon did tell Craft and does not support the idea that Shannon went further and made the "too old" comment. Finally, Craft argues that the district court never expressly re-

(Continued on following page)

the stand at trial that he did not recall Shannon making such a comment but who had said in his deposition that Shannon had done so—again diametrically opposite testimony, this time from one witness. Credibility thus was central to the district court's finding on this point.

Respect for the role of the district court is especially crucial as to determinations which rest on "variations in demeanor and tone of voice" of the witnesses and "the listener's understanding of and *belief in* what is said." *Anderson,* 105 S.Ct. at 1512 (emphasis added). The Supreme Court has cautioned:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can *virtually never* be clear error.

Id. at 1513 (emphasis added). The district court was in the best position to determine whether to believe Shannon or Craft, and there are no circumstances suggesting any basis for finding clear error in the district court's choice in favor of Shannon.

Craft next argues, as do the amici curiae, that the district court clearly erred in failing to find that KMBC enforced appearance standards more strictly as to female

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Footnote continued—

jected her testimony that Shannon also told her viewers wanted to see "young, pretty women for news anchors." We believe, however, that this statement was implicitly discounted by the court through its failure to include any such comment in its affirmative findings as to what Shannon did say to Craft and through its discrediting of the "too old, too unattractive" testimony. *Craft,* 572 F.Supp. at 874.

than as to male on-air personnel.[7] In support of her position she points to the evidence most favorable to her, which shows that only females were subject to daily scrutiny of their appearance or were ever required to change clothes at the station before going on the air and that no male was ever directed to take time from his journalistic duties to select clothing, with the help of a consultant, from Macy's and to test that clothing on camera for the approval of another consultant. The district court, however, concluded that such facts, in light of other evidence, showed only that KMBC was concerned with the appearance of all its on-air personnel and that it took measures appropriate to individual situations, characteristics, and shortcomings. *Craft,* 572 F.Supp. at 875, 876, 878. The court found that KMBC had only gradually increased its attentions to Craft's appearance, with the institution of the clothing calendar representing the culmination of efforts made necessary when lesser suggestions, such as those complied with by other personnel, proved ineffective. *Id.* at 878.

The evidence shows that one female, Brenda Williams, had never been the subject of criticism for her appearance while numerous males on occasion had been given specific

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7. The court instead concluded,

> If anything, [the] evidence shows a consistent concern by management over the appearance of all on-air personnel without regard to sex but with regard to the peculiar characteristics of each employee. Plaintiff was an employee of atypical aptitudes and attitudes, and defendant merely acted to correct appearance problems which plaintiff was unable or unwilling to remedy. The actions taken by defendant in regard to plaintiff's appearance were not the result of any general animus toward women or of any specific animus toward plaintiff as a woman. It may well be that in plaintiff's case some of the steps taken by management were unprecedented, but they were not ipso facto discriminatory.

Craft, 572 F.Supp. at 878.

directions as to their individual shortcomings. Mike Placke, for example, had been told to lose weight, to get better-fitting clothes, to refrain from wearing sweaters under jackets, and to tie his necktie in a certain manner. Similarly, Michael Mahoney had been told to lose weight and to pay more attention to his wardrobe and hairstyle, while Bob Werley had been told to try wearing contact lenses and to get a hair piece and had been given a makeup chart on a form similar to that used with Craft. Shannon had discussed hair or moustache problems with Tim Richardson, Dave Dusik, Stan Carmack, and Corrice Collins, and Craig Sager had been advised to improve his wardrobe. Even Feldman on at least two occasions had received specific directives regarding his choice of shirts, and the Macy's clothing consultant who worked with Craft testified that she had also met with Feldman and Dusik. Media Associates eventually prepared wardrobe "dos" and "don'ts" for male as well as female newscasters.[8] The district court found that the male personnel generally complied with grooming suggestions.

An interpretation of this record as showing that KMBC enforced its appearance standards equally as to males and females in response to individual problems is neither "illogical" nor "implausible" and has "support in inferences that may be drawn from the facts." *Anderson*, 105 S.Ct. at 1513. We cannot conclude that the district court erred in this respect.

Our determination is not altered by the testimony, cited by Craft, of the consultant Wilford or of other female KMBC employees to the effect that the station put

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8. Shannon testified that the tips for females were prepared in May 1981 primarily for Craft while the guides for males were not prepared until November 1981, around three months after Craft left the station.

more emphasis on the appearance of females. This testimony represents only the opinions and impressions of the witnesses as to KMBC's policy, and the district court by implication rejected such opinions, making its own finding to the contrary on the record.[9] The court also apparently chose not to believe testimony by Pam Whiting that Shannon had said it was more important for she and Craft than for Feldman to look good on the air; Whiting herself had been subject to a great deal of attention as to her appearance and had eventually left the station, and on the stand she expressed the opinion that appearance was overemphasized in television news and said she hoped Craft prevailed. Finally, the district court attributed the use in the survey of questions on appearance and good looks only as to female anchors as prompted not by sexual bias but by the concerns raised as to Craft by the focus groups. *Craft,* 572 F.Supp. at 873. The viewers were asked to rank the male anchors on more points concerning personality and "coldness," Feldman's perceived weaknesses. The inclusion of a makeup criterion and a requirement that Craft not deviate from her clothing calendar in the "standards of performance" by which her work was to be evaluated, in contrast to the absence of any appearance objectives in Feldman's "standards of performance," similarly just reflected management's efforts to pursue with personnel their individual weaknesses.[10]

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9. Furthermore, the female employees generally testified only that they had no *knowledge* of criticisms by KMBC of the appearance of male on-air personnel. In a strict sense such testimony is not even inconsistent with that of Shannon that such criticisms were made.

10. Feldman's temper and personality, for example, were his special problems. He frequently argued with the female producers, and management had spoken to him about his "throwing curve balls" during newcasts to fluster other on-air personnel. In addition, he had been sharply reprimanded for referring to Craft in the newsroom as "that girl."

Craft further argues, however, again joined by the amici curiae, that even if KMBC was evenhanded in applying its appearance standards, the district court erred in failing to recognize that the standards themselves were discriminatory.[11] She contends that she was forced to conform to a stereotypical image of how a woman anchor should appear. The evidence included a communication from the consultant, Wilford, to Shannon suggesting that Craft purchase more blouses with "feminine touches," such as bows and ruffles, because many of her clothes were "too masculine." The general wardrobe hints for females developed by Media Associates warned that women with "soft" hairstyles and looks should wear blazers to establish their authority and credibility while women with short "masculine" hairstyles shouldn't wear "masculine" clothing in dark colors and with strong lines because they would appear too "aggressive." The district court found that Craft had been hired to "soften" KMBC's news presentation. *Id.* at 871.

The "dos" and "don'ts" for anchors suggested that while males should remember "professional *image*," female anchors were to remember "professional *elegance*" (emphasis added). The outfits on the clothing calendar given to Craft were dominated by recognized fashion labels. Wilford testified that in April she had told Craft not to wear the same outfit more than once every three to four weeks because people would start calling in about it; males,

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11. The court instead concluded,

> Thus, defendant's standards of appearance for its on-air personnel can in no way be considered discriminatory per se. Both men and women were required to maintain a professional, business-like appearance consistent with community standards. Since television is a visual medium, as plaintiff admitted in her testimony, such a reasonable requirement is obviously critical to defendant's economic well-being.

Craft, 572 F.Supp. at 877.

however, Wilford said, could wear an outfit every week and a suit even twice within the same week if combined with a different tie. Wilford further testified that viewers —particularly other women—criticize women more severely than men for their appearance on camera and that women's dress is more complex and demanding because "society has made it that way." Craft's argument is that these differing standards as to females reflect customer preferences, which a number of cases have held cannot justify discriminatory practices. *E.g., Diaz v. Pan American World Airways,* 442 F.2d 385, 389 (5th Cir.), *cert. denied,* 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); *see also Gerdom v. Continental Airlines,* 692 F.2d 602, 609 (9th Cir.1982), *cert. dismissed,* 460 U.S. 1074, 103 S.Ct. 1534, 75 L.Ed.2d 954 (1983); *Fernandez v. Wynn Oil Co.,* 653 F.2d 1273, 1276-77 (9th Cir.1981).

The district court, however, found that KMBC's appearance standards were based instead on permissible factors. 572 F.Supp. at 877. While there may have been some emphasis on the feminine stereotype of "softness" and bows and ruffles and on the fashionableness of female anchors, the evidence suggests such concerns were incidental to a true focus on consistency of appearance, proper coordination of colors and textures, the effects of studio lighting on clothing and makeup, and the greater degree of conservatism thought necessary in the Kansas City market. The "dos" and "don'ts" for female anchors addressed the need to avoid, for example, tight sweaters or overly "sexy" clothing and extreme "high fashion" or "sporty" outfits while the male "dos" and "don'ts similarly cautioned against "frivolous" colors and "extreme" textures and styles as damaging to the "authority" of newscasters. These criteria do not implicate the primary thrust of Title VII, which is to prompt employers to "dis-

card outmoded sex stereotypes posing distinct employment disadvantages for one sex." *Knott v. Missouri Pacific Railroad,* 527 F.2d 1249, 1251 (8th Cir.1975); *see generally* Note, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance,* 85 Colum.L.Rev. 190, 201 (1985).[12]

Courts have recognized that the appearance of a company's employees may contribute greatly to the company's image and success with the public and thus that a reasonable dress or grooming code is a proper management prerogative. *E.g., Fagan v. National Cash Register Co.,* 481 F.2d 1115, 1124-25 (D.C.Cir.1973); *La Von Lanigan v. Bartlett & Co. Grain,* 466 F.Supp. 1388, 1392 (W.D.Mo. 1979). Evidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were "obviously critical" to KMBC's economic well-being; and even Craft admitted

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12. Dress requirements that have been found to violate Title VII have generally involved, for example, demeaning stereotypes as to female characteristics and abilities or stereotypical notions of female attractiveness or use of female sexuality to attract business. *E.g., Gerdom v. Continental Airlines,* 692 F.2d 602, 608-09 (9th Cir.1982) (weight requirements for female flight attendants to insure slenderness), *cert. dismissed,* 460 U.S. 1074, 103 S.Ct. 1534, 75 L.Ed.2d 954 (1983); *Carroll v. Talman Fed. Sav. & Loan Ass'n,* 604 F.2d 1028, 1032-33 (7th Cir.1979) (requirement that only female employees wear uniforms was demeaning and implied that females had lesser professional status and was based on the stereotype that females are so caught up in competition as to appearance that they cannot adhere to good business taste as to dress), *cert. denied,* 445 U.S. 929, 100 S.Ct. 1316, 63 L.Ed.2d 762 (1980); *Laffey v. Northwest Airlines,* 567 F.2d 429, 439 n. 24 (D.C.Cir.1976) (female cabin attendants forbidden to wear eyeglasses), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978); *Equal Empl. Opportunity Comm'n v. Sage Realty Corp.,* 507 F.Supp. 599, 607-11 (S.D. N.Y.1981) (female lobby attendant required to wear revealing and provocative uniform that subjected her to sexual harassment). *Cf. Wilson v. Southwest Airlines Co.,* 517 F.Supp. 292 (N.D. Tex.1981) (flight attendant position limited to females by employer who merely wished to exploit female sexuality as a marketing tool to attract customers and insure profitability).

she recognized that television was a visual medium and that on-air personnel would need to wear appropriate clothes and makeup. *Craft*, 572 F.Supp. at 877; *see* Note, *supra*, at 201 ("As television is a visual medium, television networks and local stations clearly have a right to require both male and female anchors to maintain a professional appearance while on camera."). While we believe the record shows an overemphasis by KMBC on appearance, we are not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation—i.e., questions of substance versus image—in television journalism. The record does not leave us with the "definite and firm conviction" that the district court erred or adopted an impermissible view of the evidence when it concluded that KMBC's appearance standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images.

We further reject the argument of Craft that the perception, discussed above, that she would add warmth and "comfortability" to the newscast defined a stereotypical "female" role, secondary to that of the male anchor, into which she was forced in terms of story assignments and division of duties. First, we observe that the research survey asked participants to rank both male and female anchors in response to the statement "comfortable to watch." In addition, the district court rejected Craft's factual contention that Feldman was assigned the lead story more frequently and was given more live stories while she was assigned the human interest, personal, and humorous stories. The court, for example, while acknowledging the testimony of news producer Sandra Woodward that she initially was instructed to give Feldman

about two-thirds of the lead stories, also accepted testimony of Shannon that that policy had been designed to ease the transition to coanchors for Craft and the viewers and was discontinued after a few weeks, after which time the lead stories were equitably divided. *Craft*, 572 F. Supp. at 872, 875. The court further found that the on-site reporting and hard news stories were equitably distributed. *Id.* at 875. Finally, Shannon testified that Craft herself suggested her Thursday arts and entertainment segment to take advantage of her cultural background and her contacts from Santa Barbara with various Hollywood personalities. Craft cites no facts sufficient for us to find the district court's interpretation of the record in this regard clearly erroneous.

We also cannot conclude that the district court erred when it held that Craft was not impermissibly removed as anchor on the basis of gender. While we disposed earlier of the alleged "too old, too unattractive" statement and have also already discussed the legitimate reasons why the survey questions focused on appearance only as to the female and not as to the male anchors, Craft further argues that her reassignment was based on a discriminatory interpretation of the survey results. She contends that discrimination may be inferred in that KMBC attributed all the negative viewer reaction to her despite Feldman's earlier problems in the ratings and the failure of most respondents to name him as a positive reason for watching the station. She further alleges that she was unfairly burdened with having to offset Feldman's weaknesses. The inferences on which she relies, however, are insufficient to justify setting aside the conclusions of the district court.

Craft essentially is asking us to reject the district court's findings accepting Media Associates' interpretation

of the survey data and to substitute our own interpretation thereof. The evaluation of expert testimony, however, is primarily the function of the district court. *Hoefelman v. Conservation Commission of Missouri*, 718 F.2d 281, 284-85 (8th Cir.1983). The court here specifically found that the survey had been "conducted in accordance with generally accepted principles of survey research" and that its results were "trustworthy." *Craft*, 572 F.Supp. at 873. Craft scored low on many neutral points such as knowledge of Kansas City, journalism ability, and apparent enjoyment of her job, and the court found "simply no evidence" that the survey had been designed to effect her removal because of her gender. *Id.* at 878. It concluded that KMBC was entitled to—and did—rely on the Media Associates report. *Id.* at 879.

We further reject Craft's argument that even if the survey was objective, KMBC's reliance on it was merely a pretext because the station ignored improved ratings and profits during her tenure: This shows only that broadcast market research is an inexact science and does not make clearly erroneous the district court's conclusion that KMBC still relied upon the survey in good faith. The court in addition found that the ratings cited by Craft were "equivocal at best" and were not yet available when she was reassigned. *Id.* at 876. KMBC's failure to delay its decision a few days until the ratings did come out may just be testament to the unprecedented negative reaction to Craft suggested by the survey. Finally, KMBC's allegedly differing treatment of two males who also were criticized in the survey is insufficient to raise an inference of discrimination because of the more extreme nature of Craft's difficulties and Craft's pivotal role on the newscast as coanchor.

C.

Our conclusion that Craft was not subject to sex discrimination either in KMBC's application of its appearance standards or in its reassignment of her to reporter effectively determines the outcome of her claim of constructive discharge. Craft does not dispute that such a claim requires a showing of work conditions that a reasonable person would find intolerable, *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir.1981); she contends, however, that a finding of unlawfully discriminatory working conditions is sufficient to meet this standard. *See Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir.1982). Given the absence of such a finding here, her argument fails. Furthermore, even if we were to accept Craft's argument that her reassignment (which was permitted by the terms of her contract) or the criticism of her appearance, while not discriminatory, did make her working conditions intolerable, the district court found no evidence that KMBC took those actions with an intent to force her to quit. *See Bunny Bread*, 646 F.2d at 1256. The court in fact believed testimony that Replogle in May had urged Craft to remain as anchor and that Shannon at the time of the reassignment had urged Craft to reconsider her immediate reaction and remain as reporter rather than returning to Santa Barbara. *Craft*, 572 F.Supp. at 874, 879.

D.

In sum, Craft's arguments as to her Title VII discrimination claims are basically factual invitations to us to reevaluate the record and interpret the evidence in the light most favorable to her while overlooking substantial evidence favorable to KMBC.[13] Even her con-

13. Craft's argument rests in part on the failure of the district court to take into consideration many issues raised by

(Continued on following page)

tention, for example, that the district court in finding no discrimination erred "as a matter of law" addresses a factual issue. To grant her relief we would have to adopt findings contrary to those of the district court and assume a judicial role contrary to that assigned to us by Rule 52(a) and Supreme Court precedent. *See Anderson, supra; Pullman-Standard, supra.* We decline to do either. The district court found that KMBC was equally concerned with the appearance of its male and female on-air personnel and that any extra attention to Craft was the gradual result of her indifference to the station's legitimate need that she maintain a professional, businesslike image appropriate to Kansas City. The court further found that Craft's reassignment to reporter was made in reasonable reliance on a proper market survey and that no constructive discharge occurred. We are not firmly convinced that any of these conclusions is clearly erroneous.

II.

Turning to the fraud claim, Metromedia argues that, as a matter of law, Craft failed to make a submissible jury issue. The alleged misrepresentation, as set out in the verdict directing instruction requested by Craft at the Joplin trial, was that "defendant represented to the plaintiff that her appearance was fine and that defendant liked everything about her appearance and intended no make-

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Footnote continued—

her evidence. We have already discussed a number of such claims, and we do not believe the district court's order is deficient in failing to deal with every piece of evidence in the record, particularly in light of the ten-day trial resulting in a transcript in excess of 2,000 pages. *See Tate v. Weyerhaeuser Co.*, 733 F.2d 598, 605 (8th Cir.1983), *cert. denied*, ... U.S. ....., 105 S.Ct. 160, 83 L.Ed.2d 97 (1984); *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir.1983), *cert. denied*, ... U.S. ....., 104 S.Ct. 2155, 80 L.Ed.2d 541 (1984).

over or substantial changes in her appearance."[14] Specifically, Metromedia contends that this statement is one of opinion or value that will not support a fraud claim or is too indefinite to be actionable and that there is insufficient evidence that the statement was false or false when made.[15]

The parties do not dispute that Missouri law applies to Craft's fraud claim. Under such law the burden is on the plaintiff to establish a submissible case of fraud, and failure as to any one essential element is fatal to the entire claim. *Powers v. Shore,* 248 S.W.2d 1, 5 (Mo.1952) (en banc); *Lowther v. Hays,* 225 S.W.2d 708, 713 (Mo. 1950); *Emily v. Bayne,* 371 S.W.2d 663, 666 (Mo.Ct.App. 1963). Fraud may be established by circumstantial evidence, *Martin v. Brune,* 631 S.W.2d 77, 80 (Mo.Ct.App. 1982); however, it may not be presumed, and a party's case will fail if he can show only facts and circumstances which are equally consistent with honesty and good faith. *Macon-Atlanta State Bank v. Gall,* 666 S.W.2d 934, 941 (Mo.Ct.App.1984).

The standard of review as to the submissibility of Craft's case is the same under both federal and Missouri

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14. At the first trial Craft also submitted as a representation that she was hired specifically for the job of coanchor and for no other purpose. She expressly abandoned this claim at the second trial in Joplin. Our review of the submissibility of the fraud claim is based on the record at that trial, but we observe that our study of the record of the Kansas City trial revealed no evidence favorable to Craft that was not also before the second jury.

15. Metromedia also argues that there is insufficient evidence that Craft relied on the alleged misrepresentation or suffered damages attributable thereto, that Craft waived her claim, and, in the alternative, that a third trial should be held because of errors in admission of evidence, the jury instructions, and closing arguments. Because of our disposition of the issues set forth in the body of our opinion, we need not reach these additional points.

law. *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir.1984). We may find for Metromedia only if "all the evidence points one way and is susceptible of no reasonable inferences sustaining the position" of Craft. *Id.* (quoting *Dace v. ACF Industries*, 722 F.2d 374, 375 (8th Cir.1983) (quoting *Decker-Ruhl Ford Sales v. Ford Motor Credit Co.*, 523 F.2d 833, 836 (8th Cir.1975)). Furthermore, we must resolve direct factual conflicts in favor of Craft, assume as true all facts in her favor which the evidence tends to prove, and give her the benefit of all reasonable inferences. We may not find for Metromedia if the evidence so viewed would "allow reasonable jurors to differ as to the conclusions that could be drawn." *See Crues*, 729 F.2d at 1148 (quoting *Dace*, 722 F.2d at 375).

A.

It is true, as Metromedia argues, that a statement of opinion or value is not an actionable representation of fact because it relates to terms of degree capable of different interpretations. *E.g., Carrier Corp. v. Royale Investment Co.*, 366 S.W.2d 346, 356 (Mo.1963) (statement that a refrigerating machine is "easy" to install is not an actionable representation because the term "easy" has a comparative or relative connotation). While this principle may be relevant to KMBC's statements that it "liked" Craft's appearance, it is not controlling as to the more crucial portion of the submitted representation that the station did not intend any "makeover or substantial changes" in Craft's appearance.

Statements of present intent may be representations of fact which, if false, will support fraud claims under Missouri law. *Kansas State Bank v. Citizens Bank of Windsor*, 737 F.2d 1490, 1498 (8th Cir.1984); *White v. Mulvania*, 575 S.W.2d 184, 188 (Mo.1978) (en banc). We

have no difficulty concluding that the "no makeover or substantial changes" representation requested by Craft in the instruction was a statement of present intent on the part of Shannon and Replogle. We do not believe the presence of somewhat imprecise terms such as "change" and "makeover" automatically renders their statement non-actionable "opinion" or "puffery" in the classical sense argued by Metromedia. Missouri courts have found sufficient allegations of fraud for the jury when service station operators have been told their leases would not be canceled if they ran "good" operations and performed "satisfactorily." *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 549-51 (Mo.Ct.App.1983); *Sagehorn v. Phillips Petroleum Co.*, 648 S.W.2d 647, 649 (Mo.Ct.App.1983).

B.

The critical element in a fraud case based on a statement of present intent is proof that the speaker at the time of utterance actually did not intend to perform consistently with his words; absent such an inconsistent intent there is no misrepresentation of fact or state of mind but only a breach of promise or failure to perform. *See Grosser v. Kandel-Iken Builders*, 647 S.W.2d 911, 914 (Mo.Ct.App.1983); *Brennaman v. Andes & Roberts Brothers Construction Co.*, 506 S.W.2d 462, 465 (Mo.Ct.App.1973). It is not enough if for any reason, good or bad, the speaker changes his mind and fails or refuses to carry his expressed intention into effect. *Dillard v. Earnhart*, 457 S.W. 2d 666, 670 (Mo.1970) (quoting *Restatement of Torts* § 530 comment a (1938)). As Missouri courts thus have held, an intent not to perform

> cannot be established solely by proof of [the speaker's] nonperformance nor does his failure to perform the agreement throw upon him the burden of showing

> that his nonperformance was due to reasons which operated after the agreement was entered into. Such intention may be shown by any other evidence which sufficiently indicates its existence as, for example, the certainty that he would not be in funds to carry out his promise.

Dillard, 457 S.W.2d at 671 (quoting *Restatement of Torts* § 530 comment c (1938)). Craft's claim of fraud comes down to this narrow issue.

Craft argues vigorously that KMBC, contrary to the statements it made to her, had from the beginning a secret intention to substantially change or make over her appearance. She stresses Shannon's instruction to Wilford not to discuss makeup with Craft during their first meeting because he would be working with Craft himself on appearance and makeup. Wilford, prior to Craft's selection, had expressed the opinion that Craft's appearance was not conservative or sophisticated enough for Kansas City audiences, although the consensus of the Group at Media Associates had been that Craft was the strongest of the three finalists it screened. Shannon testified that he knew when he hired Craft that he would be working on her makeup and clothing, and criticism of her appearance began with her debut on the newscast. Shannon further testified that appearance was KMBC's major concern in an anchor, and Replogle agreed that while appearance was not the only qualification, it was the "first thing on the list." The evidence established that KMBC in the past had given performers direct orders with respect to their appearance. For example, Cheryl Jones had been ordered to change her hairstyle to eliminate the "frizzy appearance" (she was given her most recent formal portrait as a guide to what Replogle and Shannon wanted and was told that the result had to

be acceptable to them and that they would handle any questions from her hairdresser), and Mike Placke had been ordered to lose twenty-five pounds, to get a good-fitting suit, to avoid wearing sweaters and vests, and to tie his tie with a four-in-hand instead of a Windsor knot.

While this evidence supports the inference that Shannon and Replogle at the time they made the challenged statements knew they were going to work on Craft's appearance, we are not satisfied that it demonstrates that when they promised they intended "no makeover or substantial changes," such statements were false. It is well to consider further what "makeover or substantial changes" means.[16] The ultimate measure of the representation's truth or falsity is what Craft could reasonably have understood KMBC to have promised. *See Toenjes v. L.J. McNeary Construction Co.*, 406 S.W.2d 101, 105 (Mo.Ct.App. 1966). She testified that a "makeover" was "changing someone's appearance" and that she had believed KMBC didn't want to change anything about her. This position, however, is not totally consistent with the "*substantial* changes" (emphasis added) language submitted in the jury instruction. It seems plain, thus, that a jury could not reasonably have measured the falsity of KMBC's representation against Craft's subjective view of a "makeover" as any change at all. Therefore, the intent to work on Craft's appearance demonstrated abundantly by her evidence does not establish that Shannon and Replogle at the time of their representation had the intention to "make her over."

While it can be argued that Craft was "made over" in being forced to exchange her casual California beach

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16. Shannon and Replogle were convinced that the actions they took in regard to Craft did not constitute a "makeover."

look—she testified that in Santa Barbara she occasionally went directly from the beach to the studio—for a conservative, sophisticated, businesslike image of "professional elegance," we believe that in her audition interviews with KMBC Craft was concerned essentially with her hair and makeup and not with clothing.[17] The language of an alleged misrepresentation must be considered in light of the background in which the statements were made and the context in which the words were used. *Toenjes,* 406 S.W.2d at 105. KMBC's statements to Craft were made in response to her expressions of concern about her experience with CBS, where the network had required that her hair be cropped and died blond, her eyebrows shaved and died black, and heavy makeup applied.

Even if Craft does have an arguable position that the representation of "no makeover or substantial changes" had application to clothing, a reasonable jury could not have found a "makeover" until KMBC's efforts reached their most extreme extent in the late days of Craft's employment. There is, however, no evidence that the station at the time it made the challenged representation knew it would exercise such an intrusive degree of control or knew that such control would be in its eyes necessary. The record demonstrates that KMBC asserted varying degrees of control over the appearances of its on-air personnel, finding no control at all necessary as to Brenda Williams while requiring assorted measures of other an-

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17. The record reveals no action by KMBC in regard to Craft's hair or makeup that could be seen as constituting a "makeover." The station expressed a desire that her hair be worn at the length and natural color apparent in the Santa Barbara tape, and Craft assured the station that her shorter, lighter hairstyle upon arrival in Kansas City was due to a recent unsatisfactory styling and that she intended to let her hair grow back out. Furthermore, Craft was allowed to apply her own makeup except for the one ill-fated occasion, and we do not believe mere suggestions constitute a "makeover."

chors, sportscasters and weathercasters. There is no evidence that the station had any knowledge where along this spectrum Craft might fall or what facility she might demonstrate in adjusting her wardrobe to the Kansas City climate and market. In fact, the record is basically uncontradicted as to the gradual increase in the intensity of the measures taken by KMBC in regard to Craft's appearance. Craft at first was given only the most general advice through books and fashion magazines and a memorandum suggesting makeup techniques. Although Wilford testified that she had been asked on short notice to come to Kansas City in January, just days after Craft's debut as coanchor, to work specifically on Craft's (and Pam Whiting's) appearance, it was not until April that the arrangement with Macy's and its clothing consultant was established. The clothing calendar was not actually instituted until late July or early August.

Having considered the record in the light most favorable to Craft and given her the benefit of all favorable inferences, we must conclude that there is insufficient evidence for a reasonable jury to have found that KMBC at the time it made its representation contemplated such extensive measures as to her appearance so as to make false its statements that it intended "no makeover or substantial changes." Even taking the evidence as establishing that KMBC's actions differed from those promised, the record does no more than suggest that the station, because of the difficulties it experienced with Craft, changed its mind as to steps that would be necessary as to her appearance. *See Dillard,* 457 S.W.2d at 670 (quoting *Restatement of Torts* § 530 comment a (1938)). Such evidence does not establish Craft's case of fraud or shift the burden to KMBC to show that its "nonperformance" was caused by reasons operating after it made its repre-

sentation. *See Dillard,* 457 S.W.2d at 671 (quoting *Restatement of Torts* § 530 comment c (1938)). There is here, as in *Dillard,* a failure of proof that the statements of present intent were false when made. Craft as a matter of law has not established a submissible case of fraud. The judgment on the jury verdict on this issue must be reversed and the district court instructed to enter judgment in favor of Metromedia.

III.

In view of our conclusion above we need not reach Craft's arguments that the district court's factual findings on her Title VII claim impermissibly conflicted with the findings of the jury on the fraud claim and that the district court erred in granting a new trial on the fraud issue. We note, however, that the authority to grant or deny a new trial is a matter of discretion which we may not reverse absent a strong showing of clear abuse. *Commercial National Bank v. Missouri Pacific Railroad,* 631 F. 2d 563, 565 (8th Cir.1980); *Lane v. Chowning,* 610 F.2d 1385, 1388 (8th Cir.1979); *Bates v. Hensley,* 414 F.2d 1006, 1011 (8th Cir.1969).

Finally, Craft argues that the district court erred in excluding certain evidence offered on her equal pay claim and that the verdict against her on that claim was against the clear weight of the evidence. Specifically, Craft contends that Brenda Williams should have been allowed to testify that she was told she would not be hired to replace Craft as coanchor if she held out for a salary comparable to Feldman's and to give her opinion that the station had created a "female anchor" position that would pay only an amount substantially less than that paid to the male anchor. The admission of evidence, however, also is within the discretion of the district court, and we may not reverse

absent a "clear and prejudicial" abuse of that discretion. *Roth v. Black & Decker,* 737 F.2d 779, 783 (8th Cir.1984); *Haynes v. American Motors Corp.,* 691 F.2d 1268, 1272 (8th Cir.1982). When the excluded testimony is considered against the matters as to which Williams was allowed to testify before the jury, we cannot find such an abuse.

The weight of the evidence argument is particularly directed to the discretion of the district court; and while some of our decisions suggest that we could not review the denial of such a new trial motion even for abuse of discretion, *SCNO Barge Lines v. Anderson Clayton & Co.,* 745 F.2d 1188, 1194 (8th Cir.1984); *cf. Kelley v. Crunk,* 713 F.2d 426, 427 (8th Cir.1983) (per curiam) (weight of evidence arguments lead to serious seventh amendment questions), we need not reach that issue because we find no abuse of discretion here. *See Rey v. City of Fredericktown,* 729 F.2d 1171, 1174 (8th Cir.1984); *Aimor Electric Works v. Omaha National Bank,* 727 F.2d 688, 692 (8th Cir.1984); *Burnett v. Lloyds of London,* 710 F.2d 488, 489-90 (8th Cir.1983) (per curiam); *Minnesota Mutual Life Insurance Co. v. Wright,* 312 F.2d 655, 659-60 (8th Cir.1963); *see generally* C. Wright & A. Miller, *Federal Practice and Procedure* § 2819 (1973).

We affirm the judgment of the district court as to all the Title VII and Equal Pay Act issues but reverse the judgment entered on the jury verdict on the fraud count and instruct the district court to enter judgment for Metromedia.

(Filed June 28, 1985)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 84-1336/1380WM

September Term, 1984

Christine Craft,
Appellee/Cross-Appellant,

vs.

Metromedia, Inc., d/b/a KMBC-TV 9,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is adjudged and decreed that the judgment of the said District Court against Craft on the Title VII and Equal Pay Act issues is affirmed. It is further adjudged and decreed that the judgment of the district court on the jury verdict on the fraud count be and is hereby reversed and the cause is remanded to the U.S. District Court for the Western Dis-

trict of Missouri with instructions to enter judgment for Metromedia in accordance with the opinion of this Court.

June 28, 1985

(See attached sheet for cost info.)

A true copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
8th Circuit.

(Seal)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 84-1336/380-WM

Christine Craft,
Appellee/Cross-Appellant,

vs.

Metromedia, Inc.,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Appellee-Cross-Appellant's Petition for Rehearing En Banc has been considered by the Court and is denied.

Petition for Rehearing by the panel is also denied.

The Court on its own motion substitutes pages 27 and 28 for pages 27 and 28 in the opinion as originally filed.*

August 19, 1985

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*See A37.

MODIFICATION OF OPINION OF JUNE 28, 1985, ISSUED AUGUST 19, 1985 ON CRAFT'S MOTION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

While it can be argued that Craft was "made over" in being forced to exchange her casual California beach look—*Shannon testified that Craft had told him** that in Santa Barbara she occasionally went directly from the beach to the studio—for a conservative, sophisticated, businesslike image of "professional elegance," we believe that in her audition interviews with KMBC Craft was concerned essentially with her hair and makeup and not with clothing.[17] The language of an alleged misrepresentation must be considered in light of the background in which the statements were made and the context in which the words were used. *Toenjes*, 406 S.W.2d at 105. KMBC's statements to Craft were made in response to her expressions of concern about her experience with CBS, where the network had required that her hair be cropped and dyed blond, her eyebrows shaved and dyed black, and heavy makeup applied.

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17. The record reveals no action by KMBC in regard to Craft's hair or makeup that could be seen as constituting a "makeover." The station expressed a desire that her hair be worn at the length and natural color apparent in the Santa Barbara tape, and Craft assured the station that her shorter, lighter hairstyle upon arrival in Kansas City was due to a recent unsatisfactory styling and that she intended to let her hair grow back out. Furthermore, Craft was allowed to apply her own makeup except for the one ill-fated occasion, and we do not believe mere suggestions constitute a "makeover."

*Emphasis added to denote modification.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 84-1336/380-WM

Christine Craft,
Appellee/Cross-Appellant,

vs.

Metromedia, Inc., etc.,
Appellant/Cross-Appellee.

Appeal from the United States District Court for the Western District of Missouri

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Appellee/cross-appellant Craft's motion for a stay of mandate is denied.

September 16, 1985

(Filed October 31, 1983)

IN THE UNITED STATES DISTRICT COURT
For the Western District of Missouri
Western Division

No. 83-0007-CV-W-8

CHRISTINE CRAFT,
Plaintiff,

vs.

METROMEDIA, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER*

Plaintiff Christine Craft filed her four-count complaint against defendant Metromedia, Inc. on January 5, 1983. Count I alleges that defendant discriminated against plaintiff on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Count II alleges that defendant paid plaintiff less than similarly situated male employees in violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Count III alleges that defendant made intentional fraudulent misrepresentations to induce plaintiff to accept employment. Count IV alleges that defendant's actions toward plaintiff, even if lawful, were intended to injure her and therefore constituted a prima facie tort.

Counsel prepared the case on an accelerated discovery schedule, and trial commenced on July 25, 1983. On the eleventh day of trial, a jury of two men and four women reached the following results: On Count I, the jury, sitting

*This Memorandum and Order is reported at 572 F.Supp. 868.

only in an advisory capacity under Fed.R.Civ.P. 39(c), found in favor of plaintiff. On Count II, the jury returned a verdict for defendant. On Count III, the jury found in favor of plaintiff and awarded actual damages of $375,000 and punitive damages of $125,000. Count IV was abandoned during trial and was not submitted to the jury.

Three matters are now before the court. First are findings of fact and conclusions of law on plaintiff's claim of sex discrimination. Second is plaintiff's motion for a new trial on her Equal Pay Act claim. Third is defendant's motion for judgment notwithstanding the verdict, new trial, or remittitur on the fraud count.

I. SEX DISCRIMINATION CLAIM

There is no right to a jury trial in discrimination actions filed under Title VII of the Civil Rights Act of 1964. *Harmon v. May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978). Therefore, with respect to Count I, the jury functioned only in an advisory capacity under Fed. R. Civ. P. 39(c). *See Order of July 22, 1983.* This court is "at liberty to accept or reject the advisory verdict." *Chicago & Northwestern Railway Co. v. Minnesota Transfer Railway Co.*, 371 F.2d 129, 130 (8th Cir. 1967). Since the decision of an advisory jury is not binding on the court and presents nothing for appellate review, it is incumbent upon the court to enter findings of fact and conclusions of law under Fed. R. Civ. P. 52(a), just as if there had been no jury. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2335 (1971).

A. Findings of Fact

Plaintiff Christine Craft is a female citizen of the United States and is a resident and citizen of California, residing at the time of trial at 3557 Padaro Lane, Car-

pinteria, California. Defendant Metromedia, Inc. is a Delaware corporation with its headquarters and principal place of business in New Jersey. Its headquarters are located at One Harmon Plaza, Secaucus, New Jersey. Prior to May 18, 1982, defendant was the owner and operator, pursuant to a license issued by the Federal Communications Commission, of KMBC-TV, Channel 9 (hereinafter KMBC), in Kansas City, Missouri. KMBC has been a network affiliate of the American Broadcasting Company (ABC) throughout the relevant period. Plaintiff was employed at KMBC as a staff announcer and performed duties as a co-anchor and reporter from December, 1980, to August 14, 1981. At all times here relevant, R. Kent Replogle was vice president and general manager of KMBC and Ridge Shannon was news director. Replogle was the highest ranking station employee, and Shannon reported directly to him. On May 18, 1982, the assets of KMBC were acquired by the Hearst Corporation, which is not a party to this action.

Plaintiff received a liberal arts degree in English and anthropology from the University of California at Santa Barbara in 1968. Upon graduation, she was first employed for two years as a teacher of emotionally disturbed and retarded children. Thereafter she pursued other interests, particularly surfing, and supported herself with an assortment of part-time jobs. Eventually, plaintiff decided to pursue a career in broadcasting. In mid-1975, she was hired as a weeknight weather reporter at KSBW-TV, a small station in Salinas, California. During her tenure of approximately one and one-half years, plaintiff worked as an announcer, reporter, and substitute sportscaster, in addition to her job as weather reporter. In late 1976 plaintiff became the weekend weather anchor at KPIX-TV in San Francisco, California, which is the sixth largest

television market in the nation. Plaintiff remained at KPIX for one year, and while there she also did some news reporting and substitute sports production and anchoring.

Plaintiff was next hired by CBS as the host of a segment of CBS Sports Spectacular entitled "Women in Sports." As part of this program, plaintiff was involved in summarizing weekly news concerning women's athletics and in producing weekly profiles of women athletes. While at CBS, plaintiff's appearance was altered by network makeup specialists. Her hair was cut short and bleached blonde, and she was required to use black eyebrow pencil and dark red lipstick. Plaintiff voiced objection to this treatment but did not voluntarily leave her employment at CBS because of it. "Women in Sports" was discontinued after thirty weeks. Plaintiff returned to California and engaged in pursuits other than television for about a year.

In mid-1979, plaintiff returned to television as a reporter at KEYT-TV in Santa Barbara, California, which is the 116th largest television market in the nation. Plaintiff also served as weeknight news anchor and occasionally presented sports and weather. Plaintiff resigned her employment at KEYT in December, 1980, to accept employment with defendant at KMBC in Kansas City.

Kansas City is the nation's twenty-seventh largest television market, and KMBC has two main competitors: KCTV (formerly KCMO-TV), Channel 5, the CBS affiliate; and WDAF-TV, channel 4, the NBC affiliate. From July, 1978, to January 5, 1981, Scott Feldman was the solo anchor on the 6 p.m. and 10 p.m. weekday newscasts at KMBC. For several years prior to Feldman's arrival in 1978, defendant had been the ratings leader in the local television news market, but its ratings had slipped since Feldman's

arrival. Research indicated that the decline was due to two factors: the appearance of co-anchors at KMBC's competitors, and a perception among viewers that Feldman lacked warmth, thereby diminishing his professionalism and authoritativeness. Based on that research and the presence of co-anchors at KMBC's competitors, Replogle and Shannon determined that KMBC should adopt a co-anchor format and that, in order to "soften" the image of its news presentation, the co-anchor should be a woman.

In the search for a female co-anchor, Shannon reviewed videotapes of numerous candidates. The Media Associates (later known as Audience Research and Development) of Dallas, Texas, a media consulting firm retained by KMBC, supplied a tape of plaintiff's work in Santa Barbara. Based on his review of many tapes, Shannon contacted several individuals, including plaintiff, to ascertain who was interested in and available to audition for the new co-anchor position. During their first telephone conversation in November of 1980, plaintiff told Shannon she was interested in the position so long as it did not involve a "makeover" of her appearance, such as she had experienced at CBS. Following further discussions, it was agreed that plaintiff would come to Kansas City for an audition, which occurred in late November, 1980. During renewed discussions about the nature of the job and the issue of plaintiff's appearance, Shannon explained the station had consultants who worked with on-air personnel in various areas, including delivery, clothing, and makeup. Plaintiff acknowledged her lack of expertise in matters of makeup and hair and indicated her willingness to work on her appearance with a consultant.

At the conclusion of the interview and audition, plaintiff was offered the position at a salary of $28,000. She returned to California with a copy of defendant's standard

contract for personal services. Shannon and Replogle had advised plaintiff to review the contract with her attorney, and plaintiff contacted her friend, Robert Hamilton, an attorney and writer who had previous experience negotiating contracts for personal services.

In the weeks that followed, Hamilton negotiated with Shannon on behalf of plaintiff, with the following results: First, the term of the contract was reduced from three years to two years. Second, plaintiff's salary was increased to $35,000 during the first year and $38,500 during the second year. Third, the standard provision permitting defendant to terminate the contract at the end of each thirteen-week cycle was deleted; in lieu thereof, defendant retained the right to terminate the contract after twelve, eighteen, and twenty-four months, thereby giving plaintiff greater job security. On the other hand, defendant rejected Hamilton's request that plaintiff's position be specifically described as co-anchor; instead, the standard language describing her position as staff announcer and permitting defendant to reassign her remained in the contract. Defendant also refused to include a clothing allowance in the contract as requested by Hamilton.

Counsel for defendant revised the standard contract to include the modifications described above. Copies of the contract were presented to plaintiff for execution sometime after she commenced her duties at the station; management again suggested the contract should be reviewed by her attorney. After approximately three weeks on the job as co-anchor, plaintiff signed the contract on January 22, 1981, without reading it in detail and without consulting an attorney.

Plaintiff had moved to Kansas City in mid-December 1980. At the direction of Shannon, she traveled via Dallas,

Texas, where she stopped and met with Lynn Wilford of the Media Associates. They evaluated plaintiff's abilities and discussed effective news presentation. At the request of Shannon, Wilford kept discussion of plaintiff's appearance to a minimum.

Plaintiff began working at the station in late December, 1980. During a short transitional period, plaintiff did some reporting and promotional work so that viewers would become acquainted with her. It was also necessary for plaintiff to familiarize herself with certain technical aspects of the KMBC news operation. She began as co-anchor on January 5, 1981; to further ease the transition for plaintiff and the viewing audience, Shannon directed the news producer to assign the "lead-in" or first news story of each broadcast to Feldman about two-thirds of the time and to plaintiff about one-third of the time. This allocation continued for a few weeks; thereafter, lead stories were allocated equitably between Feldman and plaintiff.

Soon after plaintiff began her duties as co-anchor, it became apparent to Shannon and Replogle that on several occasions plaintiff's on-air makeup and clothing were inappropriate. Shannon commented to plaintiff several times early in her employment that she should dress more conservatively and use makeup properly. He arranged for Lynn Wilford to come to Kansas City on January 14, 1981, to assist plaintiff in improving her appearance. During this visit, Wilford worked on plaintiff's wardrobe and makeup. In subsequent periodic visits to the station, Wilford continued these efforts, achieving only modest success.

During her initial months of employment, plaintiff had considerable discretion in the selection of her on-

air clothing. Although Shannon made occasional suggestions or criticisms as to the appropriateness of certain pieces of clothing, neither he nor any other representative of defendant mandated that plaintiff observe any strict dress code during her first months at the station. Beginning in April, 1981, KMBC arranged for Macy's Department Store to provide clothing for plaintiff in exchange for advertising time. Maureen Shawver, a clothing consultant from Macy's, assisted plaintiff in making clothing selections. In addition, Wilford reviewed videotapes of plaintiff in various outfits. Plaintiff was not ordered to wear any of the clothes selected, and in fact she rejected several items suggested by Shawver.

On May 19 and 20, 1981, Steven Meacham of the Media Associates conducted four focus group discussions to learn how television viewers perceived KMBC's news program. A focus group is an accepted research technique whereby a small group of individuals with similar demographic characteristics meet to discuss a given subject, in this instance television news in Kansas City. A focus group does not product scientifically reliable results because of the small statistical sample; however, it may suggest possible trends and areas for further research.

Meacham acted as moderator of the focus group discussions. Many topics were discussed, and the participants reviewed sample videotapes of local news programs. The response to plaintiff, and in particular to her appearance, was overwhelmingly negative. During the course of these discussions, and after the participants' attitude toward plaintiff had become apparent, Meacham on more than one occasion made derogatory remarks about plaintiff. Although his comments may have been indecorous and ill-advised, it is clear from listening to the tapes that they

were made after the attitude of the group had been made very clear and they did not influence the opinions held by focus group participants.

Station management observed the focus groups from behind a one-way mirror. Shannon and Replogle met with plaintiff on May 21, 1981, to discuss the results and possible responses. Replogle advised plaintiff that there seemed to be some problems with her acceptance by the Kansas City viewing audience, but he indicated that management was ready to work with her to overcome those problems. Plaintiff at first said she wanted to be let out of her contract so that she could return "home" to California. Replogle reiterated defendant's desire to retain plaintiff's services and to work with her to overcome the negative audience response. Plaintiff eventually agreed to cooperate with defendant in that endeavor. Replogle stated that defendant would be instituting a clothing calendar for plaintiff. She agreed to follow the calendar when she received it. Thereafter, plaintiff's wardrobe was more closely supervised, but the clothing calendar was not formally instituted until late July or early August a few weeks before plaintiff was removed as co-anchor.

As a follow-up to the focus groups, Media Associates conducted a telephone survey in late June, 1981, of the attitudes of four hundred randomly selected individuals residing in the greater Kansas City viewing area. All persons and organizations involved in the construction, administration, and analysis of the survey were experienced in market and broadcasting research. The survey measured the attitudes of Kansas City television viewers toward a wide range of selected aspects of television news in Kansas City. The questionnaire was drafted by Steven Meacham and revised by station management and

included questions on various issues raised by the focus group participants, including plaintiff's dress and appearance. The questionnaire asked questions from both sides of the appearance and dress issues for plaintiff, in an attempt to see if persons surveyed perceived as strengths those qualities which the focus groups perceived as drawbacks. The questionnaire was administered during long-distance telephone interviews by trained employees of Weise, Rozmarin & Associates of Omaha, Nebraska. Weise, Rozmarin used accepted quality control procedures in validating the interviewers' work and the data entered for computer analysis. The data was processed with the commonly used Statistical Program for the Social Sciences and was generated in the form of a computer print-out with indexed tables. Weise, Rozmarin forwarded the data to Media Associates in Dallas. The survey was conducted in accordance with generally accepted principles of survey research, and its results are trustworthy; moreover, defendant's reliance on those results was reasonable and appropriate. Plaintiff's attempt to question the validity of the survey research through the testimony of Thomas Beisecker, an Associate Professor of Communications Studies at the University of Kansas, was not persuasive. He conceded the telephone survey was not sex-biased and he lacked credentials and experience in the area of broadcasting research.

Shannon and Replogle received the final results of the June telephone survey on about August 3, 1981. The report concluded that plaintiff was having an extremely adverse impact on defendant's acceptance among Kansas City viewers. In the survey, plaintiff was compared to the female co-anchors at WDAF and KCMO and was found to be the least popular and least accepted of the three in almost every category. Comparisons were made pri-

marily to Anne Peterson, who co-anchored at KMBC's primary competitor, KCMO. In virtually every comparison with Peterson, plaintiff trailed. On August 13, 1981, Shannon and Replogle met with consultants from Media Associates, who recommended that plaintiff be replaced immediately. Shannon and Replogle initially resisted the suggestion, but after discussing the matter in Replogle's office the next morning, Friday, August 14, they agreed to remove plaintiff as co-anchor and to reassign her to the position of general assignment reporter at no loss in pay or other contractual benefits. Shannon decided he would tell plaintiff of the decision to reassign her when she came to work at 2:30 p.m. After finishing his discussion with Replogle, which lasted most of the morning, Shannon went to his office in the newsroom. Shortly thereafter, he encountered plaintiff, who had come to work early to edit a story. Since she would soon be leaving for an interview, Shannon decided to inform her of the reassignment immediately. At his request, plaintiff entered Shannon's office. During the discussion that followed, only the two of them were present and the door to Shannon's office was closed.

Shannon began by reminding plaintiff of their previous discussions about her appearance and on-air stumbling and their attempts to overcome those obstacles. Referring to the recent research, he said that these factors had created a wall between plaintiff and viewers and that she was being removed as co-anchor and reassigned as a general assignment reporter. Plaintiff asked why she was being reassigned, and in response, Shannon turned to a cabinet behind hi[illegible]k in which he had placed the Media Associates' rep[illegible]rt. He picked it up and said that the results of the research were devastating and unprecedented in the history of Media Associates. Shannon said that the

report proved that the audience perceived plaintiff's dress, appearance, makeup, and presentation as stumbling blocks. Further, Shannon said that the report showed that female viewers were leaving KMBC for its closest competitor, KCMO. Although Shannon told plaintiff that defendant intended to honor its contractual obligation to her, plaintiff said that she was going home to Santa Barbara. Shannon encouraged plaintiff to stay on as a reporter and suggested she take the weekend off to consider the matter. Before leaving Shannon's office, plaintiff indicated that she did not think she would change her mind about leaving. At no time during their discussion on August 14, 1981, did Shannon tell plaintiff she was being reassigned because she was too old, too unattractive, and not deferential enough to men or that she was being reassigned because the audience so perceived her.

Over the weekend, plaintiff discussed her situation with several persons, including her attorney Robert Hamilton and a local newspaper reporter. On the following Monday, August 17, 1981, she sent a telegram to defendant reiterating her decision not to accept a reassignment. During this same period, Hamilton telephoned Shannon several times to urge him to reinstate plaintiff as co-anchor. When Shannon refused, Hamilton on one occasion lost his temper and threatened to make the matter a "cause celebre." A meeting on Tuesday, August 18, 1981, between plaintiff, Shannon, and Replogle at the Kansas City Club, called by defendant in an attempt to resolve the matter amicably, ended in an impasse.

When Shannon arrived at work on Monday, August 24, 1981, he found the clothes defendant had bought for plaintiff on the couch in his office and plaintiff's key to the station on his desk. Plaintiff appeared at the station

about 8:45 a.m. that morning and informed Shannon she was reporting to work as a co-anchor. He responded that she could work as a reporter. Plaintiff said "good-bye" and left, returned to her apartment and drove to Santa Barbara, California, a few days later. On September 1, 1981, plaintiff commenced work as co-anchor at KEYT in Santa Barbara, a job she still held at the time of trial.

KMBC management was concerned about the appearance of all its on-air personnel, both male and female. Management expected grooming and dress to be consistent with community standards; on-air personnel understood the need to maintain a professional and business-like appearance. Whenever an appearance problem was detected, management responded with measures appropriate to the individual situation. Plaintiff received counseling in clothing and makeup, areas in which she acknowledged her lack of expertise. When it later became apparent that additional measures were needed to correct the problems, clothing was acquired from Macy's and a clothing calendar was instituted.

Pam Whiting, the weekend co-anchor during most of the time plaintiff was weeknight co-anchor, is another example of management's individualized response to appearance problems. Like plaintiff, Whiting, whose prior employment was limited to radio, was inexperienced in the use of appropriate television makeup; therefore, consultants were used to educate her in makeup techniques. Clothing was also an occasional problem, but the circumstances did not warrant a clothing calendar or routine purchase of clothing for Whiting. Unlike plaintiff, Whiting also had problems with her weight and her hairstyle; therefore, individualized analysis and recommendations were made in those areas.

Brenda Williams has been employed at KMBC since 1977 in various positions, including weekend anchor and reporter, and Williams was selected to replace plaintiff as weeknight co-anchor in September, 1981. Williams' appearance was always satisfactory to defendant, and no corrective measures were ever necessary.

Defendant also gave individualized attention to the appearance of male on-air personnel. The appearance of co-anchor Scott Feldman was generally satisfactory; however, on at least two occasions, he received specific directives regarding his choice of shirts. Shannon and Wilford told Mike Placke, the weekend weatherman, to lose weight and improve his wardrobe; he followed those suggestions. Wilford suggested that Bob Werley, a reporter, blow dry his hair, try contact lenses, and change his on-air make-up. Werley took the advice although he discovered that he could not wear contact lenses, so he changed his make-up to improve his appearance with glasses. Michael Mahoney, a reporter, was told that he needed to lose weight and improve his wardrobe; he did so. In addition, Mahoney occasionally experienced a nervous twitch in his mouth, which resembled a sneer. Management attempted to assist him in overcoming this problem. Shannon told Tim Richardson, a noon newscaster and reporter, to change his hairstyle; Richardson complied.

Newsroom operations were conducted without regard to sex, consistent with defendant's policy of equal co-anchors. After the first few weeks of plaintiff's performance as co-anchor, lead-in stories were equitably distributed between plaintiff and her co-anchor, Scott Feldman. Other job assignments which plaintiff considered desirable, including on-site reporting and "hard" news stories, were also equitably distributed, as were less desir-

able duties such as "news teases" (short promotional segments taped at about 4 p.m.), to the extent possible given the exigencies of the newsroom. On one occasion, in March, 1981, Shannon reprimanded Feldman for referring to plaintiff as "that girl," telling Feldman that such conduct would not be tolerated. As plaintiff testified, "Ridge reprimanded Scott for using that type of language and told both of us we were co-equal, we were co-anchors and he would not tolerate that sort of language."

Although Feldman was paid more than plaintiff, the differential was based on factors other than sex. Feldman had an education in broadcasting, several years of experience as a news anchor in major television markets prior to coming to Kansas City in 1978, and was well established in the Kansas City market by the time plaintiff arrived in 1981. On the other hand, plaintiff had no formal education in broadcasting, her experience as a news anchor was limited to small television markets, and she was unknown to Kansas City viewers.

Ratings, or measurements of the size of the viewing audience, are very important in the television industry because they have a direct effect on a station's advertising revenue. Two private companies, Arbitron and Nielsen, issue ratings several times a year. Ratings measure audience behavior by ascertaining the number of persons actually tuned to a given station. In contrast, audience research, such as that conducted by Media Associates, measures attitudes in an attempt to explain and forecast the ratings. Audience research enables station management to adjust its programming to increase, or at least to maintain, its share of the audience.

The results of the audience research have been previously summarized. In addition, both parties introduced

considerable evidence on KMBC's ratings before, during, and after plaintiff's tenure at the station. This evidence was equivocal at best and is of no particular assistance to the court in resolving the issues raised under Title VII since defendant removed plaintiff as co-anchor based on research showing negative viewer attitudes toward plaintiff which could be expected to result in an eventual erosion of defendant's ratings. The July, 1981, ratings were unavailable and unknown to defendant when plaintiff was removed as co-anchor; therefore, whether those ratings ultimately went up or down is simply irrelevant to the issue of sex discrimination. Even assuming the ratings improved during and immediately after plaintiff's tenure, that would simply mean that defendant and its consultants erred in their predictions, and such evidence would not support an inference of sex discrimination.

In summary, plaintiff was not discriminated against because of her sex. The measures taken by defendant with respect to her appearance were necessary and appropriate considering her individual shortcomings. Plaintiff's salary was determined on the basis of factors other than sex. Plaintiff was not constructively discharged since defendant did not render her working conditions intolerable, and they were not, in fact, intolerable. Plaintiff voluntarily resigned rather than accept a reassignment pursuant to the terms of her contract. Accordingly, she suffered no damages attributable to any wrongful act of defendant.

B. Conclusions of Law

Defendant is an employer within the meaning of 42 U.S.C. § 2000e(b). The court has jurisdiction over the parties and subject matter jurisdiction of this action under 28 U.S.C. § 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(1).

42 U.S.C. § 2000e-(2)(a) provides in part that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."

Plaintiff makes essentially three claims of sex discrimination. She first asserts discrimination in the terms and conditions of her employment; specifically, she complains that she was subjected to a rigorous dress code and constant criticism of her appearance while her male counterparts received no such treatment. Plaintiff's second complaint of sex discrimination concerns her removal as co-anchor; she claims that defendant's explicit and implicit reasons for removing her were based on sex and that defendant's actions amounted to a constructive discharge. Finally, plaintiff asserts that she was paid less than Scott Feldman because of her sex. With respect to all of her claims under Title VII, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

Plaintiff's first claim of sex discrimination based on defendant's actions with respect to her appearance must be analyzed both in terms of theory and practice. To the extent that plaintiff might argue that Title VII absolutely prohibits an employer from imposing reasonable but different standards of appearance for males and females, such a position must be rejected as contrary to the overwhelming weight of authority. Title VII "was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers." *Knott v. Missouri Pacific Railroad Co.,* 527

F.2d 1249, 1251-52 (8th Cir. 1975). "[A] private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees and such does not constitute an unfair employment practice within the meaning of 42 U.S.C. § 2000e-2(a)." *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975). *See also Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977) (citing cases).

The courts which have considered this issue have taken a realistic and common-sense approach. For instance, in *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973), the court stated:

> Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.[1]

Id. at 1124-25. Judge Collinson of this district has taken a similar approach:

> Employment decisions . . . based on either dress codes or policies regarding hair length are more closely related to the company's choice of how to run its business rather than to its obligation to provide equal

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1. It is well recognized that Title VII "was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259.

> employment opportunities. The decision to project a certain image as one aspect of company policy is the employer's prerogative which employees may accept or reject. If they choose to reject the policy, they are subject to such sanctions as deemed appropriate by the company. An employer is simply not required to account for personal preferences with respect to dress and grooming standards.

Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979). *See also Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc).

Thus, defendant's standards of appearance for its on-air personnel can in no way be considered discriminatory per se. Both men and women were required to maintain a professional, business-like appearance consistent with community standards. Since television is a visual medium, as plaintiff admitted in her testimony, such a reasonable requirement is obviously critical to defendant's economic well-being.

Plaintiff's claim of sex discrimination is also based on defendant's standards of appearance as applied. She contends that defendant routinely and rigorously enforced dress and makeup requirements for women but not for men. This court recognizes that otherwise permissible appearance and grooming standards could be unlawful if invidiously applied. *See Knott,* 527 F.2d at 1252 (upholding validity of reasonable grooming and appearance standards when "imposed in an evenhanded manner on all employees"). Ultimately the issue is a matter of proof, and the evidence fails to sustain plaintiff's position.

An individual's appearance is a unique and often sensitive matter. Television by its nature requires station man-

agement to exercise special supervision over matters of personal appearance, yet it was apparent at trial that KMBC management found it preferable and politic to permit on-air personnel to operate within rather general appearance guidelines to the extent feasible considering the skill and judgment of each employee. Many employees, both male and female, demonstrated a fairly consistent ability to maintain their appearance at a level acceptable to management; therefore, little or no supervision or criticism was necessary. Other employees, also of both sexes, had more difficulty maintaining their appearance. Plaintiff was one of these; therefore, management found it necessary to offer criticism, advice, and assistance, tailored to fit her individual needs.

In plaintiff's particular case, management had to contend with several factors. First was plaintiff's highly visible role as co-anchor, which meant that the fortunes of KMBC were linked to the impression plaintiff left with viewers. Second was plaintiff's below-average aptitude in matters of clothing and makeup. Third was plaintiff's attitude that her appearance was not critical to her success as an anchor, an attitude directly opposite to that of management. The final factor was plaintiff's acute sensitivity to management's efforts to improve her appearance. Faced with this unique and difficult situation, management responded cautiously and gradually. With the assistance of consultants, defendant first attempted to teach plaintiff the necessary skills in makeup and clothing. When this diplomatic approach proved ineffective, the next step was to acquire clothing for plaintiff and to suggest how it should be worn. Finally, management found it necessary to implement a clothing calendar and to monitor plaintiff's appearance closely.

Defendant's responses to the appearance problems of other employees, both male and female, do not support an inference of discrimination. If anything, that evidence shows a consistent concern by management over the appearance of all on-air personnel without regard to sex but with regard to the peculiar characteristics of each employee. Plaintiff was an employee of atypical aptitudes and attitudes, and defendant merely acted to correct appearance problems which plaintiff was unable or unwilling to remedy. The actions taken by defendant in regard to plaintiff's appearance were not the result of any general animus toward women or of any specific animus toward plaintiff as a woman. It may well be that in plaintiff's case some of the steps taken by management were unprecedented, but they were not ipso facto discriminatory.

Plaintiff's second claim of sex discrimination concerns her removal as co-anchor. Insofar as this claim is based on the much-publicized litany—"too old, too unattractive, and not deferential enough to men"—allegedly uttered by Shannon on August 14, 1981, it is rejected since this court has concluded as a matter of fact that Shannon said no such thing.

Plaintiff also contends that discrimination can be inferred from the circumstances surrounding her removal as co-anchor; however, she has not sustained her burden of proof on this contention. Defendant's reliance on the results of the telephone survey conducted by Media Associates was not pretextual and was in fact the reason plaintiff was reassigned. The survey was a routine procedure designed to evaluate many facets of the KMBC news operation and was conducted, tabulated, and evaluated by persons experienced in the field of broadcast research. There is simply no evidence that the survey was

designed to effect the removal of plaintiff as co-anchor because of her sex or any other reason: even plaintiff's expert conceded the survey was not sex-biased. Under these circumstances, defendant was entitled to rely on the results of the survey.

Plaintiff suggests an inference of sexual animus can be drawn by contrasting the consultant's report to the ratings from the same period; however, even assuming the ratings unequivocally showed KMBC to be in first place just prior to plaintiff's removal as co-anchor, a more plausible inference is that television research is an inexact science. It might also be argued broadly that defendant should not have relied on the consultant's report as a basis for removing plaintiff as co-anchor, but this is a normative issue not properly before the court under Title VII:

> The news business may indeed have its quirks and vagaries, in this age when the selection of a new anchor for the CBS evening news is itself front-page news, but consultant's reports and ratings routinely serve as the basis for personnel changes. Furthermore, the ratings and the report provided strong evidence in support of the defendant's decision.

Haines v. Knight-Ridder Broadcasting, Inc., 25 Empl. Prac. Dec. (CCH) ¶ 31,650 (D.R.I. July 3, 1980).

As part of the claim arising out of her removal as co-anchor, plaintiff also contends that she was constructively discharged because of her sex. This contention is untenable on both the law and the facts. "Generally, a constructive discharge occurs when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee has no other choice but to quit." *Irving v. Dubuque Packing Co.*, 689

F.2d 170, 172 (10th Cir. 1982). "To constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit." *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). Here the evidence does not support a finding that plaintiff's working conditions became so intolerable that she had no choice but to quit; moreover, there is no evidence that any of the actions by defendant were taken with the intent to force plaintiff's resignation. On the contrary, it appears that defendant repeatedly expressed its desire to retain plaintiff first as co-anchor and later as a reporter.

Plaintiff's last claim under Title VII is simply a reprise of her Equal Pay Act claim. The jury found against her on that claim, and elsewhere this court has refused to disturb that finding. *See* Section II, *infra*. It would therefore be entirely inappropriate to reconsider the matter under Title VII since the jury found the defendant had established a defense under the Equal Pay Act. *See Orahood v. Board of Trustees*, 645 F.2d 651, 654 n.3 (8th Cir. 1981) ("a defendant who establishes one of [the four affirmative defenses in the Equal Pay Act] cannot be held liable under either Title VII or the Equal Pay Act"). Even assuming plaintiff's pay claim could now be considered under Title VII, the evidence demonstrated that the difference in pay between plaintiff and Scott Feldman was attributable to several factors other than sex, particularly education and experience.

In summary, defendant's actions toward plaintiff during her employment at KMBC were not based on her sex—with one notable and ironic exception: but for the fact that she is a female, plaintiff would not have been hired as a co-anchor in December, 1980, regardless of her

other abilities. Thereafter, defendant's treatment of plaintiff was the result of the factors other than sex. Her salary was less than that of Scott Feldman not because she was a woman but because her education and experience were not commensurate with his. She was a "co-equal co-anchor," and newsroom operations were conducted without regard to sex. Her affinity for the casual beach life and her apparent indifference to matters of appearance required defendant to formulate and implement corrective measures appropriate to her unique circumstances. Defendant reassigned plaintiff because properly conducted audience research demonstrated unprecedented negative viewer response toward her. She was not constructively discharged; rather, she voluntarily left KMBC rather than abide by the terms of a contract which she had signed but never carefully reviewed.

II. EQUAL PAY ACT CLAIM

The jury returned a verdict for defendant under Count II, the Equal Pay Act claim, and plaintiff has moved for a new trial.

A review of the suggestions filed in support of the motion fails to convince the court that the verdict on Count II should be disturbed. Contrary to plaintiff's assertion, the verdict was not against the clear weight of the evidence. Plaintiff's allegations of instructional error on Count II are not well taken. Finally, the court adheres to its previous rulings on the admission and exclusion of evidence concerning the compensation of other KMBC employees.

III. FRAUD CLAIM

On plaintiff's claim of fraud under Count III, the jury awarded actual damages of $375,000 and punitive

damages of $125,000. Defendant now seeks judgment notwithstanding the verdict or a new trial or remittitur. Defendant has filed extensive suggestions in support of its motion, and plaintiff has responded in kind.

At the outset, it is apparent that the motion for judgment notwithstanding the verdict should be denied. Technically, it is merely a renewal of the motion for directed verdict made at the close of all the evidence. *Johnson v. Rogers,* 621 F.2d 300, 305 (8th Cir. 1980). In this case, the motion for directed verdict was denied after extensive post-trial briefing and argument. *Order of August 31, 1983.* A motion for judgment notwithstanding the verdict "can be granted only if the motion for directed verdict should have been granted." *Walker v. KFC Corp.,* 515 F. Supp. 612, 615 (S.D. Cal. 1981). Defendant has not convinced this court that a directed verdict should have been granted; therefore, the motion for judgment notwithstanding the verdict will be denied.

This court has greater latitude in considering defendant's alternative motion for a new trial: "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2803 (1973). A new trial may be ordered for a great variety of reasons:

> It has been said that the general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

Id. § 2805. *See also Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972) (court may order new trial if first trial resulted in a miscarriage of justice), *cert. denied*, 410 U.S. 930 (1973). "[W]here the trial court finds the verdict contrary to the weight of the evidence and grants a new trial . . . the appellate court should 'exercise a closer degree of scrutiny and supervision . . . in order to protect the litigants' right to jury trial.'" *Id.*, 466 F.2d at 187 (quoting *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3rd Cir.), *cert. denied*, 364 U.S. 835 (1960)). On the other hand:

> When evidence is erroneously admitted or excluded or where the trial court has erred in the instructions to the jury, the trial court is considered in a better position to correct a manifest injustice in ruling on the motion for new trial. Under these circumstances the grant of the new trial does not interfere with the role of the jury as the trier of fact.

Fireman's Fund, 466 F.2d at 186. The trial court is also in the best position to determine whether the verdict is excessive; it is the opinion of the Eighth Circuit that

> inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that

there is a "plain injustice" or a "monstrous" or "shocking" result.

Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 410 (8th Cir. 1976) (quoting *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961)).

The jury awarded plaintiff $375,000 in actual damages and $125,000 in punitive damages. The court is firmly convinced that this verdict is excessive and is the result of passion, prejudice, confusion, or mistake on the part of the jury. It is telling to note that plaintiff prayed for $200,000 in actual damages in her complaint and her counsel asked for $75,000 to $100,000 in actual damages in closing argument, yet the jury awarded $375,000. Although the award of punitive damages was within the amount specified in the prayer and closing argument, the jury's unprincipled award of actual damages makes the award of punitive damages inherently suspect.

Instructional errors may be in part responsible for the excessive award. Prior to trial, the court announced that the issue of punitive damages would be submitted, if at all, only after a finding of liability. The goal of this bifurcated procedure was to focus the jury's attention first on the question of liability in order to promote a more reasoned analysis of the case. Unfortunately, the issue of punitive damages was not expressly withdrawn from the jury when the case was first submitted, and it is apparent that the award of "compensatory" damages contains a substantial, but undefined, punitive element. On retrial, the submission of damages will again be bifurcated; however, the issue of punitive damages will be expressly withdrawn from the jury during its initial deliberations to eliminate the risk of jury confusion or mistake.

Another instructional shortcoming concerns the issue of wrongful discharge. In a case such as this, it is important that the jury not be given a roving commission to second-guess defendant's managerial decisions. Defendant submitted a proposed instruction to withdraw from the jury any consideration of the general fairness or reasonableness of defendant's actions toward plaintiff. Although the court was amendable to such an instruction in theory, defendant's proposal was unsatisfactory as were attempts to revise it. The proposed instruction was also rejected in favor of Instruction No. 12, which expressly withdrew wrongful discharge and related issues from the jury under Count I. However, a review of the instructions as a whole now convinces the court that wrongful discharge and related issues were not clearly withdrawn from the jury's consideration, particularly with respect to Count III. It is therefore quite possible that the jury was confused or mistaken as to the applicable law, and a new trial is appropriate.

In addition to the mistake and confusion possibly created by the instructions, the excessive verdict is also certainly attributable to passion and prejudice caused by the pervasive publicity surrounding this case. News reports and commentary on the circumstances surrounding plaintiff's departure from KMBC began within days after she was removed as co-anchor and increased as trial approached. The effect of this pretrial publicity was explored during voir dire, but the news coverage of course continued after the jury was impaneled. Although the jury was repeatedly admonished not to discuss the case with anyone and to disregard news accounts of the trial, even the most conscientious juror would have been unable to ignore the pervasive and relentless publicity and could not have been immune from its effect.

In support of its motion for new trial, defendant has filed two volumes which contain only a sampling of the local and national coverage of the case by newspapers and wire services. In addition, the trial received obsessive attention from local television stations and the national networks. Although cameras were not allowed in the courtroom, television crews were frequently stationed at the perimeter of the building, recording the comings and goings of trial participants. Present each day in the gallery were courtroom artists and a substantial number of reporters, including some whose faces were undoubtedly well known to the jurors. During closing arguments, the gallery was literally crammed to capacity.[2] The news accounts resulting from all this attention in most instances described the case in terms of plaintiff's prayer for $1.2 million in damages and her allegation that defendant told her she was "too old, too unattractive, and not deferential enough to men." The ceaseless incantation of these allegations worked to the advantage of plaintiff and to the serious detriment of defendant.

Consistent with the customary practice in civil cases in this district, the jury was never sequestered. The court is firmly convinced that, as a result, the jury became so infected with passion and prejudice that it was unable to discharge its duty of fairness to both parties. Upon retrial, the jury will be sequestered to assure both parties an impartial jury.

Two additional measures will be taken to ensure the integrity of the jury. First, the case will be retried to

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2. By an unfortunate circumstance of timing, the jury retired to deliberate late on a Friday afternoon. Deliberations were recessed over the weekend, thereby increased the risk that the jury was exposed to prejudicial publicity at a crucial point in the trial.

a jury of twelve. *See* Local Rule 14C. See also 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2491 (1971 & Supp. 1982). This should reduce the risk that one or two headstrong jurors might unduly influence the jury and should increase the chances that reason will prevail over passion. Second, the case will be retried in Joplin, Missouri, in the Southwestern Division of this District. Moving the case away from Kansas City should reduce the level of trial publicity and make it more likely that the jury can reach a decision based solely on the evidence presented in court. In addition, jury selection should be easier since it is less likely that prospective jurors in the Southwestern Division will have been exposed to the intense publicity which emanated from Kansas City during the first trial.

Because of the excessive verdict attributable to incomplete instruction of the jury and to incessant and overwhelming trial publicity, a new trial on all issues raised under Count III is required. Reduction of the damage award by remittiture is inappropriate because passion and prejudice influenced not only the jury's calculation of damages but also its decision on the threshold issue of liability. *See Richardson v. Communications Workers of America,* 530 F.2d 126, 129 (8th Cir.) (in excessive verdict cases, decision whether to reduce verdict or grant new trial is primarily for trial court), *cert. denied,* 429 U.S. 824 (1976).

IV. CONCLUSION

For the reasons stated, it is

ORDERED that judgment is entered in favor of defendant and against plaintiff on Count I of her complaint. It is further

ORDERED that plaintiff's Motion for a New Trial on the Equal Pay Act Claim is denied. It is further

ORDERED that defendant's alternative motions for judgment notwithstanding the verdict or for remittitur on Count III are denied. It is further

ORDERED that defendant's alternative motion for a new trial on Count III is granted. Retrial of all issues raised under Count III will begin at 9:30 a.m. on Wednesday, January 4, 1984, at the Federal Courthouse in Joplin, Missouri; a jury of twelve will be impaneled and will be sequestered throughout the proceedings. It is further

ORDERED that no later than Friday, November 18, 1983, each side shall file suggestions concerning the most appropriate method by which to conduct an orderly, efficient, and searching voir dire of prospective jurors. It is further

ORDERED that proposed jury instructions shall be filed no later than Friday, December 9, 1983.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

October 31, 1983

(Filed January 13, 1984)

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
Western District of Missouri,

83-0007-CV-W-8

Christine Craft-

V.

Metromedia, Inc.
Honorable Joseph E. Stevens, Jr.

[X] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

on the claim of Plaintiff Christine Craft against Defendant Metromedia, Inc., for fraudulent representations, judgment is hereby entered in favor of Plaintiff and against Defendant, with actual damages assessed at Two Hundred Twenty-five Thousand ($225,000) Dollars and punitive damages assessed at One Hundred Thousand ($100,000) Dollars.

R. F. Connor
Clerk
/s/ (Illegible)
(By) Deputy Clerk

January 13, 1984

(Filed January 17, 1984)

IN THE UNITED STATES DISTRICT COURT
For the Western District of Missouri
Western Division

No. 83-0007-CV-W-8

CHRISTINE CRAFT,
Plaintiff,

vs.

METROMEDIA, INC.,
Defendant.

ORDER

Prior to submission of plaintiff's fraud claim, the court deferred a ruling on defendant's motion for directed verdict at the close of all the evidence. Rule 50(b) provides that "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Rule 58 provides that "upon a general verdict of a jury . . . the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court."

It appears to the court that under Rule 50(b) deferral of defendant's motion for directed verdict was tantamount to a denial thereof, and the clerk of the court routinely enters judgment as of the date of the verdict. Therefore, it appears that the time for filing motions under Rules

50(b) and 59(b) began to run at the time of verdict; moreover, Rule 6(b) prohibits the court from extending the time for filing such motions. Accordingly, in the interest of clarity; it is

ORDERED that defendant's motion for directed verdict at the close of all the evidence shall be deemed denied as of January 13, 1984.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

January 17, 1984

(Filed February 7, 1984)

IN THE UNITED STATES DISTRICT COURT
For the Western District of Missouri
Western Division

No. 83-0007-CV-W-8

CHRISTINE CRAFT,
Plaintiff,

vs.

METROMEDIA, INC.,
Defendant.

ORDER

Pursuant to the order of October 31, 1983, a new trial on plaintiff's fraud claim commenced in Joplin, Missouri, on January 4, 1984. On January 13, 1984, the sequestered jury of twelve found in favor of plaintiff and awarded her $225,000 in actual damages and $100,000 in punitive damages. Defendant has now filed its Motion for Judgment Notwithstanding the Verdict and Motion for New Trial as to Count III, to which plaintiff has responded.

Defendant's motion contains eighty-seven allegations of error (plus subparts), each of which defendant asserts constitute prejudicial and plain error warranting judgment notwithstanding the verdict, or alternatively, yet another trial. Having reviewed this compendium of alleged errors, the court finds no sufficient reason to disturb the verdict.

In addition, the court is satisfied that the problems with the first trial, as described in the order of October 31, 1983, did not reoccur in the Joplin trial. The instructional

errors on wrongful discharge and punitive damages were corrected in the second trial, and the potential prejudicial impact of trial publicity on the jury was minimized or eliminated by sequestration and the increased number of jurors.

Therefore, it is

ORDERED that defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial as to Count III is denied. It is further

ORDERED that costs will be taxed as follows:

1. Each side will bear its own costs incurred up to and including August 8, 1983, the date of verdict in the first trial.

2. All costs incurred after August 8, 1983, will be taxed to defendant.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

February 7, 1984

IN THE UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 84-1336
No. 84-1380

CHRISTINE A. CRAFT,
Appellee/Cross-Appellant,

vs.

METROMEDIA, INC.,
Appellant/Cross-Appellee.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The Seventh Amendment to the United States Constitution declares:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the *right of trial by jury shall be preserved*, and *no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law.*

Christine Craft petitions for rehearing or suggests rehearing en banc, because the panel opinion handed down in this case simply is in fatal conflict with the Seventh Amendment. Three members of the Court have put their name to an opinion which violates all rules of appellate review enshrined in the decisions of this Court and the Supreme Court of the United States, by attempting to resift, reweigh, reexamine and redetermine factual issues on plaintiff's Missouri common law fraud claim, despite two

lengthy trials in which 18 jurors, fairly chosen from cross sections of the [illegible] Missouri communities of Kansas City and Joplin, a[illegible]ave *personally heard, seen,* examined, sifted, weighed and determined the factual issues as the Constitution directs they—*and only they*—must do. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 at 359-60 (1962). Judicial integrity and conscience compel reinstatement of Craft's jury verdict.

Craft's common law fraud claim arose from a series of preemployment conversations between Craft and station management at KMBC, Ridge Shannon and Kent Replogle. In response to direct questions by Craft and a friend, Bob Hamilton, Shannon and Replogle repeatedly told Craft they did not intend to make her over or change her into something she was not, but that they were more interested in Craft's journalistic credentials, and "liked what they saw." Contrary to these representations management was already working with consultants on the changes that would be made in Craft's appearance. Management's efforts to remold Craft's appearance into their image began "from day one" of her employment, and continued unabated thereafter, until her removal for reasons related to her appearance. Material errors exist between this Court's recitation of evidence—set forth in the light *least favorable to Craft*—and what the trial record truly shows when "considered in the *light most favorable* to Craft." (emphasis added). *That fact alone* "would be a matter for rehearing" under local rule 16.

Rehearing en banc is warranted as well, however, because denial of any citizen's Seventh Amendment right to a jury trial is indeed a grave constitutional issue. The panel opinion destroys uniformity of this Court's decisions on the important subject of the rigid boundary of appellate

review of sufficiency of evidence for a jury, a boundary which all appellate courts are required to steadfastly and zealously secure against breach in order to preserve public confidence in our constitutional jury system.

As stated by the Supreme Court in *Atlantic & Gulf Stevedores, Inc., supra,* 369 U.S. at 359-60:

> We might agree with the Court of Appeals *had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them.* . . . (Emphasis supplied)

The Supreme Court has often prohibited incursions by Courts of Appeal into the jury's sole province to weigh facts when alleged insufficiency of evidence results in reversal on appeal: *See, e.g., Mercer v. Theriot,* 377 U.S. 152 at 155-56 (1964); *Gallick v. Baltimore & Ohio Railroad Company,* 372 U.S. 108, 112-115 (1963) *and* cases cited; *Dick v. New York Life Insurance Co.,* 359 U.S. 437 (1959) [reversing this Court]; *Lavender v. Kurn,* 327 U.S. 645, 652-653 (1946).

The opinion is self-contradictory, in that the portion devoted to rejecting Ms. Craft's appeal of the trial judge's sex discrimination findings repeatedly admonishes Craft that the district court decision cannot be disturbed, because Craft's arguments "[b]oldly seek re-evaluation of the evidence and rejection of the district court's factual findings." (Slip Op. at 10).[1] All other trial court rulings challenged by Craft are met with similarly solid deference to the trial judge. Thus, the unanswerable questions are

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1. More than 25 times between pages 8-22 the opinion refers to the district court's discretion to decide sex-discrimination "facts," and the appeals court indeed "makes clear" its limited review *of those issues.*

how and why the panel opinion can embrace a completely new fact finding exercise on Craft's fraud claims—thereby suddenly abandoning all deference to the *jury* as fact-finder and the decision of this same district judge who considered and rejected defendant's arguments against submissibility of fraud *at least six times* in pretrial, trial and post-trial motions over the course of two trials before two different juries. The integrity of this Court's opinions demands reinstatement of Craft's jury verdict, for it defies law and logic to hold, as did the panel, that every aspect of Judge Stevens' memorandum order is impervious to attack—*except* his profoundly correct ruling that "it is apparent that the motion for judgment notwithstanding the verdict should be denied." 572 F. Supp. at 880.[2]

I. SUBSTANTIAL ERRORS EXIST BETWEEN EVIDENCE FAVORABLE TO CRAFT AND THE COURT OF APPEALS "FACT FINDING"

Court of Appeals Fact Finding:

"While it can be argued that Craft was 'made over' in being forced to exchange her *casual California* beach look—*she testified that in Santa Barbara she occasionally went directly from the beach to the studio. . . .*" (Slip Opinion at 27.) (*Apparent Source*: Ridge Shannon Vol. VI, 83.)

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2. Because Judge Stevens' rulings throughout both trials betray that his sympathies were not with plainiff, his rulings in favor of the sufficiency of evidence for submissibility are most compelling. Indeed although plaintiff vigorously opposed the order for separate retrial of the fraud claims, the panel opinion reduces the entire Joplin proceedings to an empty, monumentally wasteful mockery.

Actual Evidence Which Must Be Credited On Appeal

None. *Craft never testified as the opinion states;* Ridge Shannon did—but his testimony *must be* (but obviously was not) *ignored. Baynes v. Jenkins,* 593 S.W.2d 519, 521 (Mo. banc 1980); *Dace v. ACF Industries, Inc.,* 722 F.2d 374, 376-77 (8th Cir. 1983), supplemented, 728 F.2d 978 (8th Cir. 1984). The language of the appellate opinion also bears striking resemblance to the District Court's view of Craft's supposed "affinity for the casual beach life." 572 F. Supp. at 879.

To the contrary, clothing requirements of Kansas City were no different than the "normal clothing" worn in Santa Barbara and elsewhere where Craft had worked during her years in TV. (Vol. II, 189). Craft described "normal" appearance, which the jury could infer was "reasonable" for Kansas City, as follows (Vol. II, 193):

> Q. My question is, what do you mean when you say "normal clothing" and "that is a subjective term?"
>
> A. I mean the same things I had worn all my years in television in the sense of clean. I usually wear silk shirts and pearls or a blazer and a shirt, normal in that sense, a dress. I have always worn makeup. Always worn what I consider normal clothes.

"From day one" management's "relentless" obsession was on Craft's assymetrical face, makeup, the fact that one eye was smaller than the other, clothing selection and consultation. It can be more than "argued" Craft was "made over" as to everything all evidence showed, and *the jury believed,* she was forced to undergo. (Vol I, part 2 at 115-118, 128-31, 136-39, 142-47, 151-61, 170-76, 182-199; Vol. II, 7-19, 24-27, 31-38, 40-41; P. Ex. 104, 65)

This Court's unauthorized acceptance of Shannon's testimony robbed Craft of a jury evaluation on key credibility determinations. For example, Shannon testified regarding a preemployment conversation with Craft:

> I said, 'Do you understand we have consultants and the consultants, they offer coaching?' She said, 'I would be acceptable to that. That doesn't bother me.' I said, '*We get into appearance and clothes*' and she said, 'I am not much on makeup. I really don't care that much about clothing. This is one of my low priorities.' She said, '*In fact, sometimes I will get up in the mornings and if it is a nice morning I will go out and surf and I will go to work and just wear to work what I have got on. And sometimes I wear makeup and sometimes I don't*' and she said she did not care and did not have a lot of knowledge about clothing and makeup.
>
> I said, 'We would like to work with you on that and that would be what the coach with Media Associates could do.' She said, '*Boy, that would be great, I would like that. I would really appreciate that.*' (Vol. VI at 83)

Even on cross-examination, Craft's testimony remained staunchly different—and binding on this Court:

> Now is it also true during this time that you were talking to Mr. Shannon and Mr. Replogle there at that time of your audition and interview, you indicated that you had very little interest in the matter of clothing and makeup. *Answer*: I indicated that my primary interest was news. Question: Did you not also indicate that you would need help in those areas? Answer: *No, I did not indicate that I would*

need help in those areas. Question: *Was there not some discussion of your getting help in those areas?*

Answer: *There was not.* (Vol. II at 143-144)

In light of Craft's *uncontradicted* stated concerns about her appearance, Shannon's testimony that she enthusiastically embraced the prospect of station management and consultants "getting into appearance and clothes" appears incredible—as plaintiff argued *and was accepted by* the jury. Shannon's trial testimony also contradicted his own earlier sworn testimony:

Question: So, you didn't tell her if she was hired on she would be subject to the dictates of the Media Consultants?

Answer: Exactly the opposite.

(Vol. V at 130).[3]

Court of Appeals "Fact Finding"

"[*W*]*e believe* Craft in her audition interviews was concerned essentially with *hair and makeup and not with clothing.*" (Slip Opinion at 27.) (*Apparent Source*: Brief of Appellant at 30-36.)

* * *

"KMBC's statements to Craft were made in response to *her expressions of concern about her experience at CBS* where the network required her hair to be cut and dyed blonde, her eyebrow shade dyed black and heavy makeup applied." (Slip Opinion at 27-28.) (*Apparent Source*: Appellant's Brief at 32)

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3. These and other discrepancies in Shannon's testimony alone would have been a sufficient reason for the jury to disbelieve him entirely. *Dace v. ACF Industries, Inc., supra,* 722 F.2d at 378 n.8.

Actual Evidence Which Must Be Credited On Appeal

Contrary to what *this panel believes,* the record showed, and the *jury believed* Craft was concerned about changes in her *appearance generally,* not limited to hair, makeup or the CBS situation, because she wanted "to do what I felt was the best thing I did in communicating which was to be pretty much myself as often as possible." (Vol. I, part 2, 104). During plaintiff's conversations with Ridge Shannon, the subject of *appearance generally* was discussed:

> I reiterated to him again that if they wanted someone who looked different than the person on the tape, that I wouldn't be interested. (Vol. I at 90-91) I told him the CBS experience had made me extremely uncomfortable about *changes in my appearance* and if they liked what they saw we could talk further and I would come back for an audition. Otherwise I wasn't interested. (Vol. I at 91) If they wanted to hire someone who was bandbox perfect do not hire me. (Vol. I at 92)

In discussing the reasons why she accepted the employment offer in Kansas City, Craft testified:

> The original salary offer was not that much more than what I was making in Santa Barbara where I was still working at that time. The most important thing is that *I would be allowed to be myself* in every conversation between Santa Barbara and Kansas City, between Metromedia and Christine Craft. That was reiterated and I was assured that they had *no intentions of changing my appearance, they liked my appearance.* (Vol. II at 192) (Also see Vol. I, 104)

> When asked what kind of changes she had in mind during these discussions with Shannon, Craft testified, "change my appearance." (Vol. II at 187)

While the parties significantly differ on what was said during their preemployment discussions, even Ridge Shannon's testimony utterly destroys this Court's "finding" since *"appearance"*, was part of his discussions with Craft and the consultants. (Vol. VI at 83, 110).

Representatives of KMBC repeatedly assured Craft "They liked everything about me. *They didn't want to change me* . . . and they kept saying what they wanted was a journalist:"

> We love her just the way she is. What we are looking for is the fresh California beach look. . . . [W]e have a male co-anchor, and we want to balance him with a strong, independent woman. And what we like is Christine's freshness and her naturalness. . . . We love the way she looks. (Vol. III at pp. 11-12) When Craft told Shannon that makeup and hair were not one of her first priorities, "They said they liked what they saw." (Vol. I at 173) Management repeatedly said, What they wanted was a good journalist. (Vol. I, Part 2, at 173)

Craft further testified on cross-examination that *clothing* as well as makeup was a part of her discussion with Shannon and Replogle. (Vol. II at 134-135) Credited evidence on general appearance could not be clearer or more opposite to the opinion:

> Q: [W]hat changes did you have in mind when you had these discussions with Mr. Shannon?
>
> A: Change my appearance (Vol. II, 87) * * * everal times I told them and they concurred, *what you*

> *see is what you get.* If you want to *change me, change my appearance, don't hire me.* (Vol. II, 88)

Even Replogle used the term *appearance,* agreeing management told Craft they did not intend to make her over, redo her or change her fundamental appearance. (Vol. III at 210); he admitted Craft had said she was not interested in a job which involv[ed] "*making me into something I am not.*" (Vol. III at 166, 228) Other witnesses discussing the requirements imposed by KMBC referred continually to KMBC general appearance requirements which, as the *jury was free to infer,* from common sense and the context of all evidence, *included* not only makeup and hairstyles but clothing as well. The jury simply was *never* confronted with—or else weighed and rejected—the type of fine distinction this Court seeks to impose. (See for example, Vol. IV at 74, 91, 214, 228; Vol. VI at 166, 215.)

The CBS experience and its effect on Craft as explained and discussed with management of KMBC was considerably broader than mere hair color and eyebrow makeup, and was related to Craft's general concerns about appearance. Bob Hamilton repeatedly reminded management:

> You know what CBS did to Christine. They tried to make her into something she was not. They tried to change her and she doesn't want to come to work for you if that is what you are going to try to do her now.

(Vol. III at 45) In fact in Bob Hamilton's conversation with Ridge Shannon, the lopping off of Craft's hair and making her into a blonde at CBS was *not mentioned.* The term makeover and change her into something that she is not were the terms that Hamilton used in his conver-

sation with Ridge Shannon. (Vol. III at 45) Kent Replogle admitted telling Craft "You don't want a makeover and I agree with that." (Vol. III at 208-209) Further, Shannon and Replogle were told Craft "wants to be a journalist, not a beauty queen." (Vol. III at 45-46)

Crucially, management never told Craft of its always-extant belief that *appearance* was the number one criterion for a television newsperson (Vol. III at 174-175), and that Shannon always believed *"having an attractive anchor was part of the requirement for effective delivery of the news on Channel 9."* (Vol. V at 119, 120)

Court of Appeals Fact Finding

> "There is, however, no evidence that the station at the time it made the challenged representation knew it would exercise such an intrusive degree of control or knew that such control would be in its eyes necessary." (Slip Opinion at 28) (Apparent Source: Appellant's Brief at 36-37)
>
> "There is no evidence that the station had any knowledge where along this spectrum Craft might fall or what facilities she might demonstrate in adjusting her wardrobe to the Kansas City climate and market." (Slip Opinion at 28) (*Apparent Source*: Shannon, Vol. VI at 107)

Actual Evidence Which Must Be Credited On Appeal

Present intent to change Craft could not have been more strongly shown—by direct and circumstantial evidence.[4] The Media Associate consultants reviewing the

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4. As Instruction No. 14 aptly provides, "[i]ntent can be inferred from circumstantial evidence because a defendant's intent not to perform will seldom be capable of proof by direct evidence." Missouri law is in full accord. *Allison v. Mildred*, 307 S.W.2d 447, 453 (Mo. 1957); *see Martin v. Brune*, 631 S.W.2d 77, 80 (Mo. App. 1982); yet Craft *proved intent* by *direct evidence*.

audition tapes for the purposes of reporting to KMBC's management had negative comments concerning Craft's dress and hair and concluded her "overall look" and "appearance" would not work, because her "look" was not sophisticated enough or as conservative as Kansas City required. (Vol. IV at 212-214) Lynn Wilford and Ridge Shannon had several conversations *before Craft began work* concerning Craft's "problems on camera" and the "work" that Lynn Wilford was to do with Craft concerning these problems. Ridge Shannon *agreed* with most of Wilford's assessments of Craft's "problems." When Shannon sent Craft to Dallas to first meet Lynn Wilford in December of 1980 before Craft reported to work, he "[s]pecifically told Lynn, I do not want you to talk to Christine about appearance. . . ." (Vol. VI, 111) He told Wilford that Craft had been hurt badly by the CBS situation, and that he did not want Wilford to work on her appearance but that *"he wanted to work on that himself in Kansas City."* (Vol. IV at 218) Thus, the allowable inference *for the jury* was Shannon knew *at that moment* that management and the consultants intended forcing changes in Craft's appearance once she reported for work. Because he knew from Craft's statements regarding CBS that what the consultants and he contemplated would be *precisely what Craft did not want,* Shannon wanted to hide his deceit.

Given Shannon's undisputed admission that changes in Craft's appearance were intended, the intrusive degree of control which the jury found Shannon *would and did exercise* over Craft's appearance was amply supported by the station's past practice and history of working with individuals' appearance. (Vol. IV at 72, II at 220) The Court's own opinion recognizes that where management thought on air performers had appearance problems, management exercised control that a jury could find "in-

trusive." (Slip Op. at 13-14, 26) Such evidence, together with management's belief that appearance was the "number one criterion" for a newsperson, inexorably led *the jury* to the inference that similarly "intrusive" measures were in store for Craft; but no *inference* is necessary because intent was established *by direct evidence.*

The evidence and reasonable inferences to be drawn therefrom demonstrated that station management recognized problems with Craft's appearance before hiring her, that station management intended to work on these problems and that in the past it had exercised *what the jury could infer was "intrusive"* control over on air personnel when appearance issues arose. There was more than sufficient evidence on defendant's intent. In fact, under the rule in *Pinken v. Frank*, 704 F.2d 1019 at 1026 (8th Cir. 1983), what the *panel admits* is enough to establish "intent".[5]

Court of Appeals Fact Finding

> "Even if Craft does have an arguable position that the representation that no 'makeover or substantial changes' had application to clothing, *a reasonable jury could not have found a make over until KMBC's efforts reached their most extreme extent in the late days of Craft's employment.*" (Slip Opinion at 28)
>
> "In fact the *record is basically uncontradicted as to the gradual increase in the intensity* of measures taken by KMBC in regard to Craft's appearance." (Slip Opinion at 28)

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5. In *Pinken v. Frank* this Court held:

Although the existence of fraudulent intent is never presumed, it *may be inferred* where a party knowingly misstates a material fact, knowing that the party to whom it is made will rely on it. (Emphasis added).

No doubt plaintiff had that and more.

"Craft at first was given only the *most general advice* through books, fashion magazines and a memorandum *suggesting* makeup techniques." (Slip Opinion at 28)

"Even taking the evidence as establishing that KMBC's actions differed from those promised, the *record does no more than suggest that the station,* because of difficulties it experienced with Craft *changed its mind,* as to steps that would be necessary as to her appearance."

Actual Evidence Which Must Be Credited on Appeal

The credited evidence flatly contradicts an asserted "gradual increase in intensity" of appearance measures. Craft testified appearance criticisms began "immediately" and were "continuous" and "relentless" "from day one" until she was removed. (Vol. I, Pt. 2, 130-137, 171-72, 193) No more is required; but there is *much more.* Significantly, Shannon admitted that he began criticizing Craft's appearance "from day one" of her employment (Vol. VI at 215) and that he began working on her clothing and appearance from day one. (Vol. VI at 230)

Wilford was requested by Shannon to make an "emergency visit to Kansas City on January 14," within nine days of Craft's debut, "to work with Pam [Whiting] and Christine on their appearance." (Vol. IV at 220-221) On "day one" Shannon told Craft one eye was too small, her jaw was too square and her clothes did not look right. (Vol. I, Pt. 2, at 128-130) Immediately thereafter, Lynn Wilford performed the *specific, intrusive* "ill-fated" makeup application she was forced to wear on air (Vol. I, Pt. 2, 142-146), and gave Craft a *detailed, specific* "makeup analysis" by Gigi Coker, a woman Craft never met. (Vol.

I, Pt. 2, 151-52)[6] In January Ridge Shannon did not "suggest" but told Craft "to follow these instructions." (Vol. II, p. 8-9; P's Ex. 65). If Craft had known of such requirements, "I never would have gone to work for KMBC Metromedia." (Vol. II, 12) In *January* of 1981, Lynn Wilford took her to Macy's for the purpose of obtaining clothes. (Vol. II at p. 15) In February of 1981, she was sent to Macy's for clothes and began trying these clothes on in front of the camera. (Vol. II at 15-16)) Not only did "intrusive" working-hour sessions begin in February with Maureen Shawver at Macy's but it continued thereafter. By March of 1981 when Ridge Shannon *directed her* to go to Macy's to obtain particular clothes, i.e., a bowed polyester blouse in place of the cream silk blouse with pearls she was wearing, she had already been taken to Macy's on previous occasions by Lynn Wilford. (Vol. I, Pt. 2, at 174).

When station management started "from day one" working on Craft's appearance, no research had been done concerning her appearance, and, as shown above, credited evidence bindingly establishes appearance was the focus "continuously," from beginning to end. (Vol. II, 16-17) No more is required for the jury. Although defendant argued at the second trial it merely had "changed its mind" about appearance activities due to negative focus group research in June, Judge Stevens recognized, "change in mind is a fact issue" (Vol. II, 30) which defendant

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6. P's Ex. 104 (which includes Ex. 65), attached hereto for convenience, starkly exposes the utter falseness of the opinion's characterization of these intrusive mandates as "the most general advice" or "suggestions." The jury was free to determine the opposite. (See also P's Ex. 138, 151, 152, 155, 163, 315, 358)

urged but the jury flatly rejected.[7] Prior to the implementation of the fashion calendar in July of 1981, Craft testified that in June of 1981 when she and Ridge discussed her appearance as a result of the focus group tapes, she at that time had been wearing clothes selected for her either by Lynn Wilford or Maureen Shawver for several months, going back to January and February of 1981. (Vol. II at 24) "Intrusive" is a normative term—for the jury, not this Court.

Court of Appeals Fact Finding

"It is well to consider further what 'makeover' or 'substantial changes' means." (Slip Op. at 26)

"The record reveals *no action by KMBC in regard to Craft's hair or makeup that could be seen as constituting a 'make over'*. . . . Furthermore, Craft was

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7. Although not precisely relevant to the issues in this appeal, the district court and possibly the panel in light of its result was puzzled as to the defendant's motive. Why would the defendant bring Craft half-way across the country to defraud her? The answer is simple.

Shannon admitted on cross-examination that they had screened approximately 200 people about the co-anchor job prior to Craft (Volume VI at 165-166) and at the time they were talking with Craft they were running up against their deadline set for the selection of a co-anchor. (Volume VI at 166-167) (1) She fit budget; (2) was not under contract; and (3) was a good journalist. (Vol. VI, 73-74) She was the last of the three finalists to audition. (Vol. VI, 76) Wilford admitted that the group opinion was that Craft was the strongest of the last three candidates being screened when Craft was selected. (Volume IV at 215) But, as Shannon damningly testified, she was "overly reluctant to leave California to come to Kansas City," so Shannon "tried to be as persuasive as possible." (Vol. VI, 187) As argued to the jury, the station could not afford to hire the people they wanted for co-anchor. Of the remaining individuals Craft had the best potential to be remade over into something the defendant wanted but could not afford. When Craft failed to meet the station's "dress, makeup and general appearance" expectations, and "resisted attempts to improve her . . . .", she was removed as anchor. (Vol. III at 215)

allowed to apply her own makeup except for the one ill-fated occasion, and *we do not believe mere suggestions constitute a 'make over.'*" (Slip Opinion at 27, footnote 17)

Actual Evidence Which Must Be Credited On Appeal

As earlier discussion cements, reasonable minds might differ on what "make over" means or what constituted a make over. Such was for the jury to decide—*not this Court.*[8] Appearance changes were not "mere suggestions" but *requirements for Craft's job.* (Vol. II, 126; Vol. IV, 236; Vol. V, 110-120).[9]

II. THE OPINION IS CONTRARY TO ESTABLISHED LAW REGARDING THE SUFFICIENCY OF EVIDENCE FOR FRAUD AND THE REQUIRED REVIEW OF JURY ISSUES

The panel's opinion is fundamentally flawed not only by its failure to acknowledge plaintiff's evidence and the reasonable inferences the jury could and did draw therefrom, but also by its misuse of authority concerning required scope of review. Part I establishes the opinion merely recites but does not follow the applicable rule that it can only find in favor of Metromedia if "all the evi-

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8. The opinion footnotes, "*Shannon and Replogle were convinced . . .* actions they took . . . did not constitute a makeover." *Id.* n.16. This is only the most obvious proof that appellate review was improper. *Dace,* supra; *Bayne v. Jenkins,* supra. Indeed, if management's opinions were the legal standard, there would be no need for courts and juries.

9. Craft begs the indulgence of the Court concerning the additional length of this petition. However, because of the depth of the panel's misreading of the record, anything but a point-by-point response would be inadequate. Because at least six members of the Court are unfamiliar with the lengthy record in this case, a detailed statement is needed to properly present the issues to the full Court.

dence points one way and is susceptible of no reasonable inferences sustaining the position" of Craft. (*See* Slip Op. at 23 citing *Crues v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir. 1984)). The panel opinion is further defective because it ignores the amplification of this standard contained in the very case cited by the panel opinion. *Crues* held this court "*must . . . assume as true* all facts supporting [Craft] which the evidence *tended* to prove. . . ." *Id.* at 1148. *See also Easley v. Empire Incorporated,* 757 F.2d 923, 928 (8th Cir. 1985), and cases cited therein, wherein Judge Gibson declares:

> We can interfere with the conclusion of a jury only where there is a 'complete absence of probative facts' to support the verdict.

This rule is necessarily inconsistent with the opinion's conclusion that "the intent to work on Craft's appearance [was] demonstrated abundantly by her evidence" but that this somehow was not sufficient to make a submissible case on whether the defendant had an intention to impose a make over or substantial change.[10]

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10. An example of the Court's fundamentally misguided opinion is its reliance on *Dillard v. Earnhart,* 457 S.W.2d 666 (Mo. 1970). (*See* Slip Op. at 29.) The differences between the *Dillard* and the *Craft* cases are stark. The *Dillard* court involved a review of a *trial finding of no fraud,* rather than a 12-member jury decision that the defendant *had* acted fraudulently. Thus, the fraud argument was entitled to *no favorable inferences.* The *Dillard* opinion observes that "all the evidence" supports the result. Even this panel does not make so bold a statement about the case at bar. The *Dillard* case concerned a clear, significant change of circumstances that led to Clyde, Sr.'s refusal to release the deed. Here, without any change of circumstances whatsoever, the defendant began to implement the makeover and, at the same time, took concrete steps to conceal this intention from Craft. The panel's attempt to legitimize its violation of the jury-judge separation by a citation to *Dillard* is nonsense. The *Dillard* case provides *no* support for the court's ill-advised avoidance of the Seventh Amendment limitation.

In light of the scope of review this Court must follow, it is inconceivable that any "reasonable panel" could conclude that it was not for the jury to determine whether *the intent to work on Craft's appearance,* which the panel opinion repeatedly admits is "demonstrated abundantly" by the evidence, does not create a jury question on whether the defendant's state of mind was to cause a "makeover" or "substantial changes" in Craft's appearance. Whatever the panel or Shannon and Replogle may "believe" as to what amounts to a makeover or substantial change is totally irrelevant and should not be in this Court's opinion. Craft obviously believed makeover and substantial changes occurred, and that is what counts, since, as always, the question is what *the jury believed* and could reasonably find based on the evidence.[11]

If the evidence supported the conclusion that the defendant intended to work on Craft's appearance, the evidence necessarily "tended to prove" defendant intended to do a makeover or substantial changes, depending on which party's argument the jury believed—here obviously Craft's. Intent is locked in by *Pinken v. Frank,* 704 F.2d at 1026. The Court cites *Toenjes v. L. J. McNeary Construction Co.,* 406 S.W.2d 101, 105 (Mo. App. 1966), but stubbornly, inexplicably, does the opposite of applying its rule:

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11. The opinion wrongly implies that "makeover" is a term of art. It is not. It is a common term, for which no "definition" was requested or necessary; here it was amply defined for the jury by the context of all conduct—from many different conversations and transactions—which was properly combined and submitted to the jury as the "ultimate factual" issue making up the misrepresentation. *Webster's Third International Dictionary* pertinently defines it as "2b: REMAKE, REMODEL, RENOVATE . . . ."

> The truth or falsity of representations is to be judged *in the light of the meaning which plaintiff would reasonably attach* to them in the existing circumstances . . . and the words must be considered against the background and in the context in which they were used. *Emily v. Bayne*, Mo. App. 371 S.W.2d 663. (Emphasis added).

Thus, the panel not only usurps the role of the jury to determine the ultimate issue of the defendant's state of mind, it also draws a definitional distinction which is exclusively a matter of degree and judgment based on common sense and community standards—exactly the kind of issue juries are designed to resolve.

Faced with substantial evidence to support the jury verdict, the court contorts the facts and the law to reach its predetermined goal. The panel opinion is an excellent example of an analysis dictated by its already chosen result.[12] The panel ignores established law which accords Judge Stevens decisions on submissibility under Missouri law "great weight." *See e.g., Jasperson v. Purolator Courier Corporation,* 84-1810 and 84-1844 (8th Cir. June 24, 1985) at 6 and cases cited therein; *Melia v. Ford Motor Co.*, 534 F.2d 795, 799 (8th Cir. 1976). The opinion flies in the face of philosophies embodied in written opinion, articles and other pronouncements by the members of this Court. *See, e.g.,* Linder, *How Judges Judge: A*

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12. Implicit in the court's analysis is the premise that what the defendant did was a business judgment which should not be second guessed by a court or a jury. Although politically palatable to some members of the judiciary, this court should not so cavalierly follow its own personal preferences and ignore the role of law. That law was applied by two unanimous juries which found sufficient evidence to award punitive as well as compensatory damages. These juries heard *all* the evidence and were not handicapped by the dry, lifeless record on appeal.

Study of Disagreement On The Court of Appeals for the Eighth Circuit, 38 Ark. L. Rev. 479 (1985); Bright, *The Ten Commandments of Oral Agreement,* 67 ABA Journal Sept. 1981, noting, "appeals courts as a rule do not try cases de novo. Federal appeals courts almost never do;" Judge Arnold's dissent in *Lehman Bros. Kuhn v. Clark Oil & Refining Corporation,* 739 F.2d 1313 at 1319 (8th Cir. 1984), "[c]ases should turn on the law, the facts, and the conscience of the judge, and on nothing else."

Craft requests rehearing on all issues, inasmuch as Craft's clear entitlement to a jury determination on fraud causes irreconcilable conflict between sex discrimination findings and jury findings on fraud. Indeed, where the opinion improperly tries to create conflict between the fraud evidence and the first trial verdict director, rehearing is necessary because the verdict director in the first trial did not have the term "substantial" which now troubles the court. (J.A. 161)[13] Thus, the Court must more carefully consider Craft's serious arguments for reinstatement of the first verdict, as well as all other issues perfunctorily handled in Part III of the panel opinion. Rehearing also is suggested from a new opinion by the Missouri Supreme Court, which fortifies Craft's challenges

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13. Craft is entitled to reinstatement of her jury verdict, but due only to the vulnerable position the panel has put her in, we must mention that rehearing is required also because the opinion takes away *everything* when, in fact, instruction deficiencies or supposed infirmity in proof of actual intent—*all of which Craft denies*—would call for new trial since even by the erroneous rendition of evidence allowed in the panel's opinion, Craft would have the right to submit on representations made "without knowledge of their truth or falsity." See, e.g., *Wilson v. Murch,* 354 S.W.2d 332 at 339 (Mo. App. 1962); M.A.I. 23.05. A holding there was "insufficient evidence"—again, which Craft denies—also raises a new trial issue which Craft as prevailing party below was not in a position to raise, i.e., erroneous exclusion of evidence at trial.

to the order of retrial and rejects several arguments raised by Metromedia's appeal. *Firestone v. Crown Center Redevelopment Corporation*, No. 66840 (Mo. en banc June 25, 1985).

CONCLUSION

The second unanimous fraud verdict must be affirmed, for it is demanded by "the law, the facts and . . . conscience." Affirmance will not open the flood gates of litigation in employment cases, for fraud always must be established solely by the facts of each case—facts which here have simply met *all* tests, at all procedural stages af the litigation, and most importantly, have convinced our constitutionally anointed finders of truth—the jury—after two hotly contested trials. Truly, a more real danger created by the panel opinion is that the cold plunge into *de novo* reexamination of jury issues will likely *increase appeals*—to an already overburdened Court—from disgruntled jury verdict losers who now see a breach in the constitutional fortress which our Founders erected to protect jury trials from improper appellate second guessing.

Perhaps no one has stated the principle underlying jury verdict review more eloquently than Judge Arnold, in *Dace v. ACF*, supra, 722 F.2d at 376-77:

> Occasionally verdicts may be returned with which judges strongly disagree. This is a price, we think, worth paying for the jury system, which is embodied in our Bill of Rights and sanctified by centuries of history. When questions of fact are involved, common sense is usually more important than technical knowledge, and twelve heads are better than one.

Or *three*. Rehearing or rehearing en banc is requested on all issues. Counsel's Rule 16 Statement is attached.

Respectfully submitted,

Dennis E. Egan
Sarah W. Hays
Douglas S. Laird

GAGE & TUCKER
2345 Grand Avenue
P. O. Box 23428
Kansas City, Missouri 64141
(816) 474-6460
Attorneys for Appellee/Cross-Appellant Christine A. Craft

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 22nd day of July, 1985, to:

Donald W. Giffin, Esq.
Spencer, Fane, Britt & Browne
1000 Power and Light Building
106 West 14th Street
Kansas City, Missouri
Attorneys for Appellant/
Cross-Appellee Metromedia, Inc.

/s/ Dennis E. Egan

RULE 16 REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

A. *Supreme Court Opinions*: *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Mercer v. Theriot*, 377 U.S. 152 (1964); *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108 (1963); *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U.S. 107 (1959); *Dick v. New York Life Insurance Company*, 359 U.S. 437 (1959), reversing this court because "it committed its basic error in resolving a factual dispute in favor of respondent;" *Lavender v. Kurn*, 372 U.S. 645 (1946); *Tennant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29 (1944).

B. *Eighth Circuit Cases*: *Easley v. Empire Incorporated*, 757 F.2d 923, 928 (8th Cir. 1985); *Crues v. K.F.C. Corporation* 729 F.2d 1145 (8th Cir. 1984); *Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983), supplemented, 728 F.2d 978 (8th Cir. 1984); *Pinken v. Frank*, 704 F.2d 1019 (8th Cir. 1983).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. Does the panel opinion violate the Seventh Amendment by giving mere lip service to the appropriate stan-

dard of appellate review, while failing to accord Christine Craft, the party who obtained two unanimous jury verdicts, the most beneficial view of the evidence possible in conformity with Missouri substantive law on sufficiency of evidence to make a case of submissible fraud and Eighth Circuit decisions regarding sufficiency of evidence to make a submissible case of fraud and to create a submissible jury issue in general.

2. Does the panel opinion violate the Seventh Amendment, the Rules of Appellate Review and Missouri substantive law by undisputedly setting forth and relying on defendant's evidence where it is at odds with other direct evidence and inferences that can be drawn to the contrary in plaintiff's favor.

3. Does the opinion fail to accord the proper deference to the decision of the District Judge who, based on Missouri law, overruled defendant's claims of insufficient evidence for a submissible fraud case at every juncture during the course of two trials—the latter of which was specifically ordered by the District Judge on the separate issue of fraud.

Respectfully submitted,

/s/ Dennis E. Egan
Dennis E. Egan
Attorney for Appellee/Cross-Appellant Christine A. Craft

THE MEDIA ASSOCIATES
Audience Development

CONFIDENTIAL*

January 28, 1981

Mr. Ridge Shannon
News Director
KMBC-TV
11th and Central
Kansas City, Missouri 64105

Dear Ridge:

In this letter I would like to summarize what occurred during my last visit, share my observations from Christine's coaching session and discuss the schedule we outlined for my next visit. For your information, I have included the makeup outline I gave Christine during our session as well as a critique of Christine's makeup problems by our makeup specialist, Gigi Coker.

THE COACHING SESSION

I found that, off camera, Christine is an intelligent, attractive and personable individual. Her performance strengths are a result of these natural abilities and Christine's energy level which help her reach out to the audience.

The areas of Christine's performance weaknesses are her authority, credibility and technical delivery. During the session, Christine recognized that on-camera she has a tendency to project an image rather than being herself. She has associated acting out a masculine role with having authority and credibility rather than letting these characteristics grow from self-confidence. This improper

*Plaintiff's Exhibit 104 (See fn. 6, A89)

mental image has also affected her vocal delivery, causing her to talk in a pattern rather than in a conversational tone. She also has a tendency to talk much louder than she needs to, and she noticed that when she talks softer, she is able to use more of her vocal range and expression.

After the session, Christine and I established the following goals:

1. Christine needs to concentrate on communicating honestly with the viewer rather than projecting an image.
2. Along with being herself, she needs to be involved with her copy and develop stronger interpretation. By using a variety of moods, especially those of confidence and authority, Christine will strengthen her style and credibility.
3. Rehearsal is an integral link to Christine's success for the preceding goals. During the session, Christine noted how rehearsal helped change her from a reader into a solid communicator; however, she will probably need to be reminded to do this.
4. Finally, Christine needs to develop her voice by limiting her volume and talking in a natural conversational style rather than in a set rhythm pattern.

SUMMARY OF JANUARY 14 VISIT

During my last visit, I spent the majority of my time with Christine Craft giving her ideas and ways for her to develop and improve her personal appearance. We worked mainly on her wardrobe and followed this with a brief makeup session. I discussed with Christine how she needs to develop a look of professional elegance in addition to reasons why she has problems with developing her wardrobe. The first and most obvious cause is that

Christine has come from a relaxed, casual television market which accepted almost any type of clothing. The second reason is that Christine has a basic problem with not knowing which colors, styles and types of clothing are the most flattering for her work. I feel that she will need to be monitored closely until she develops a sense of style and is able to coordinate her outfits. The books I sent you should provide a foundation, and with additional consultation we should see improvement.

I also spent time with Pam Whiting. I gave her a performance critique and also talked about her wardrobe and hairstyle. I am glad to see her working on her appearance, losing weight and incorporating the makeup techniques that Gigi Coker gave her. Pam has also read several of the wardrobe books I suggested. These will be a help to her planning of her anchor wardrobe.

SCHEDULE FOR NEXT VISIT

The objective of my next visit is to work on tandem presentations for both the main and weekend shows. During my visit, I anticipate working not only with the talent but also with the producers. Here is a rough schedule that we discussed:

February 5

9-11 a.m.	Planning meeting with Ridge
11-2 p.m.	Meeting with producers and anchor talent from the weekday and weekend staffs
2:30-4:30 p.m.	Coaching session with Christine and Scott
4:30 p.m.	Open for work with individuals as needed

February 6

9-11 a.m.	Coaching session with Pam and Corrice
11:30-12:30 p.m.	Meeting with producers on communicating with talent
12:30-2:30 p.m.	Lunch with Ridge and Kent
2:30-4:30 p.m.	Tentative session with Christine and Scott
4:30 p.m.	Summary meeting with Ridge

Ridge, I am anticipating talking with you this week to confirm this schedule. As usual, feel free to call if there are any problems with these arrangements. Oh yes, and thank you for getting the tapes of the specialist reporters to me so quickly.

Best regards,

THE MEDIA ASSOCIATES
/s/ LCW
Lynn C. Wilford
Talent Consultant

LCW:pac

Enclosures

Copies: Kent Replogle
Tom Tilson

EVALUATION OF CHRISTINE CRAFT'S MAKEUP
BY GIGI COKER

1. *Makeup at former station.* Christine has a very nice smile and eyes. However, the attention to these areas is reduced due to several problems. The first and most obvious is that Christine is not blending her makeup.

The most severe problem occurs around the eye area where she is using too much hilight under the eye and on the brow bone above the eye. The lack of blending makes her eyes look racoonish, and the hilight above the eye makes her eyes look puffy. The second problem is lack of color on her lips and cheeks.

Complexion—The quality of the video makes it difficult to evaluate Christine's complexion and base that she is using. However, she seems to have a great deal of natural color in this picture. It is difficult to see what sort of contouring her face needs. However, her eyes and mouth need to be accented.

Eyes—It looks as though Christine is using blue eye shadow, which is not complimenting her skin or hair color.

Mouth—Christine has a nice smile, but her lipstick is much too light for the lipliner she is using.

Cheeks—Christine could use more blush, bringing it forward to the center of her face instead of keeping the color on the sides of her cheeks.

2. *Makeup at KMBC before the session.* Christine's basic problem is that she looks completely washed out. Her skin, hair, dress and the set colors are all blending together. Because her hair has been lightened, she is not only going to need more makeup, but she will need to use makeup with more color to help bring her features out. The light browns, pinks and peaches will not be effective. She is going to have to use more reds, burgundies and richer earth tones in her makeup. Her wardrobe can also help bring color to her face. She should purchase clothing which will compliment the lighter colors of her face and provide contrast with the

background of the set. The teal blues, navies, purples, reds and terra cottas should all keep her from "fading out" and work well for her, provided, of course, that her makeup is balanced with the intensity of her outfits.

Regarding Christine's face structure, she will have to pay special attention to her eyes, jaw, nose and brow areas. The first and most crucial area is her eyes. Her left eye will need to be highlighted and shadowed so that it does not look as small and slanted. The circles under her eyes should also be highlighted and blended carefully. Christine's jaw bones are square, with the left one larger than the right. This will need to be contoured. Christine's nose also needs to be contoured, especially the bridge between her eyes. Christine's eye brows look uneven and will need to be darkened slightly.

3. *Makeup from the Newsbrief.* Christine's makeup from the session is well blended and contoured. The face still needs more blush and color on the cheeks. The highlight and shadowing around the eyes is correct and almost totally eliminates Christine's problem with the circles and smaller left eye. The intensity or amount of makeup should be reduced slightly. The lines under the eye need to be smudged, and the powder under the brow extends up too far. The jaw, nose and brows all look fine.

4. *Makeup after the session.* The post-session makeup looks much better than the makeup prior to the session. The blending is much better and it seems that more time was spent working with the problem areas.

   Eyes—The shape and size of the left eye is more obvious in this newscast than in the newsbrief. Christine might

want to consider doing either one of two things to make the sizes seem more even. The first is to make the left eye look larger by placing more hilight on the left lid directly above the pupil. The second thing she could do is to make the right eye look smaller by placing a thin dark line of eyeliner on the inside of the bottom of the right eye. She should still use liner under the bottom lashes on both eyes to make the left one seem less crooked.

Contouring—More shape is needed on the bridge of Christine's nose and her left jaw.

Powder—Christine should be using powder to help set her makeup and reduce the shine. In this newscast we are getting hot spots on her nose and forehead.

Cheeks—Christine needs to use more color on her cheeks. The earlier suggestion for types of color still applies, but the most important thing to remember is to match makeup with the color in an outfit. For example, don't wear plum rouge with an orange blouse.

Hair—In several of the newscasts, the back of Christine's hair looked unusual. I would suggest that she brush it out a bit more and make the back of her head look more even.

*CONCLUSION**

Christine needs to accent her best features which are her eyes and mouth. She needs to work on problem areas around her eyes, brows, nose and mouth. Proper blending and powdering will help Christine maintain consistency in her makeup. Finally, Christine must work on choosing colors for her makeup and wardrobe which will draw focus to her face.

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*3-page illustrated make-up chart with directions for Christine Craft omitted due to inability to reproduce facsimile.

APPELLATE REVIEW OF CIVIL JURY VERDICTS

The table which follows is a summary of the reported federal appellate decisions contained in volumes 743 through 774 of Federal Reporter Second. These volumes span the most recent full year of officially reported appellate decisions, and cover the period from October 1984 through October 1985. The cases summarized are those in which the appellate court considered a claim that the factual finding of a civil jury should be overturned for lack of evidence. In most instances the appellate decisions discuss the sufficiency of the evidence in those very terms; in several cases the appellate opinion discusses the evidence as if the factual dispute were before it for a *de novo* resolution. Both types of decisions are included. The summary of the issue and disposition refers to the specific issue concerning which a jury's verdict was challenged on appeal. Cases involving cross appeals of the same verdict by opposing parties were treated for statistical purposes as two appeals but the case is listed only once.

Appellate decisions reversing part but not all of a challenged jury verdict are denoted "reversed in part." Where a distinct portion of the damages is reversed because of an asserted lack of evidence on a particular issue, that is referred to as a reversal in part; where the appellate court concluded that the jury did not err in awarding the type of damages at issue, but held that the amount of the award was excessive, the decision is described as reducing the jury's verdict. In some instances an appellate court, although reversing a verdict because of some legal error, also holds that the evidence would be sufficient to uphold a similar jury verdict were it returned after a second trial; these decisions are treated as *affirmances*.

Constitutional cases which involved claims of discrimination are listed as discrimination cases. Decisions awarding judgment n.o.v. and ordering a new trial because the first verdict was against the weight of the evidence are both characterized as a *reversal* if the action is sustained on appeal. Remittiturs and orders reducing a verdict are both categorized as a *reduction* in the verdict.

Counsel for petitioner gratefully acknowledges the assistance, in the preparation of this study, of Eric Schnapper, attorney, NAACP Legal Defense and Education Fund, and of Yale Law School students Belinda Cooper, Steven Fasman, Laurence Freedman, Steven Haber; Paul Holtzman, Edward Lazarus, Sherill Leonard, Jennifer Leuba, Lewis Liman, John Mutz, Viveca Novak Jonelle Newman and Ellen Shemitz, and of Northern Law School student Maria Tobia.*

Cases Reviewed

Conti v. Ford Motor Co., 743 F.2d 195 (3d Cir. 1984) (personal injury claim; verdict for plaintiff; reversed)

Hintz v. Jamison, 743 F.2d 535 (7th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Fields v. Washington Metropolitan Area Transit Authority, 743 F.2d 890 (D.C. Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Handguns, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

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*Because this project involved in-put from many persons and required judgment calls as to result and applicability due to lack of clarity in certain opinions, there may be room for difference of opinion on certain judgments. However, the overall statistical pattern would remain the same, regardless of how judgments have been made as to certain cases.

Wegerer v. First Commodity Corp. of Boston, 744 F.2d 719 (10th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed after remittitur)

Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Smith v. Updegraff, 744 F.2d 1354 (8th Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Haney v. Mizell Memorial Hospital, 744 F.2d 1467 (11th Cir. 1984) (personal injury claim; verdict for defendant; affirmed)

Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2d Cir. 1984) (miscellaneous claim; verdict for plaintiff; reversed)

Jurgeson v. Fairfax County, Va., 745 F.2d 868 (4th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed)

Estate of Davis v. Johnson, 745 F.2d 1066 (7th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed)

W. A. Wright, Inc. v. KDI Sylvan Pools, Inc., 746 F.2d 215 (3d Cir. 1984) (commercial claim; verdict for plaintiff; reversed in part)

Haley v. Pan American World Airways, 746 F.2d 311 (5th Cir. 1984) (personal injury claim; verdict for plaintiff; verdict reduced)

Smith v. Shell Oil Co., 746 F.2d 1087 (5th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Katch v. Speidel, 746 F.2d 1136 (6th Cir. 1984) (miscellaneous claim; verdict for plaintiff; verdict reduced)

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed in part)

Sit-Set, A.G. v. Universal Jet Exchange, Inc., 747 F.2d 921 (4th Cir. 1984) (commercial claim; verdict for plaintiff; reversed in part)

Kokesh v. American Steamship Co., 747 F.2d 1092 (6th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Morrill v. Becton, Dickinson and Co., 747 F.2d 1217 (8th Cir. 1984) (commercial case; verdict for plaintiff; verdict reduced)

Fiorito Bros., Inc. v. Fruehauf Corp., 747 F.2d 1309 (9th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Martell v. Boardwalk Enterprises Inc., 748 F.2d 740 (2d Cir. 1984) (personal injury claim; verdict for plaintiff; verdict reduced)

Worthen Bank & Trust Co., N.A. v. Utley, 748 F.2d 1269 (8th Cir. 1984) (commercial claim; verdict for plaintiff reversed in part; verdict for defendant on counterclaim reversed)

O'Donnell v. Georgia Osteopathic Hospital, Inc., 748 F.2d 1543 (11th Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Romero v. National Rifle Association of America, Inc., 749 F.2d 77 (D.C. Cir. 1984) (personal injury claim;

verdict for defendant Lowe affirmed; verdict against defendant N.R.A. reversed)

Marino v. Ballestas, 749 F.2d 162 (3d Cir. 1984) (personal injury claim; verdict for defendant; reversed in part)

Stewart & Stevenson Services, Inc. v. Pickard, 749 F.2d 635 (11th Cir. 1984) (commercial claim; verdict for plaintiff; reversed in part)

Consolidated Cigar Co. v. Texas Commerce Bank, 749 F.2d 1169 (5th Cir. 1985) (commercial claim; verdict for plaintiff; reversed in part)

Toth v. Yoder, 749 F.2d 1190 (6th Cir. 1984) (personal injury claim; verdict for plaintiff; affirmed)

Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Shipp v. General Motors Corp., 750 F.2d 418 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Preston v. Smith, 750 F.2d 530 (6th Cir. 1984) (constitutional claim; verdict for plaintiff; reversed)

Hatcock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984) (constitutional claim; verdict for plaintiff; verdict reduced)

LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984) (discrimination claim; verdict for plaintiff; reversed)

Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516 (11th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Trans-World Manufacturing Corp. v. Al Nyman & Sons, Inc., 750 F.2d 1552 (Fed. Cir. 1984) (commercial claim; verdict for defendant; reversed in part)

Cazzola v. Codman & Shurtleff, Inc., 751 F.2d 53 (1st Cir. 1984) (discrimination claim; verdict for plaintiff; affirmed)

Mackey v. Burke, 751 F.2d 322 (10th Cir. 1984) (commercial claim; verdict for plaintiff; verdict reduced)

Fisher v. First Stamford Bank and Trust Co., 751 F.2d 519 (2d Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Young v. City of New Orleans, 751 F.2d 794 (5th Cir. 1985) (constitutional claim; liability verdict for plaintiff; damage amount, attacked by plaintiff; affirmed)

Tousley v. North American Van Lines, Inc., 752 F.2d 96 (4th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Conan Properties, Inc. v. Conans Pizza, Inc., 752 F.2d 145 (5th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Gonzalez v. Volvo of America Corp., 752 F.2d 295 (7th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3d Cir. 1984) (commercial claim; verdict for plaintiff; affirmed)

Vest v. Exxon Corp., 752 F.2d 959 (5th Cir. 1985) (commercial claim; verdict for plaintiff; reversed)

Wheeler v. Mental Health & Mental Retardation Authority of Harris County, Texas, 752 F.2d 1063 (5th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed)

Armstrong v. Kansas City Southern Railway Company, 752 F.2d 1110 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Smith v. Universal Underwriters Ins. Co., 752 F.2d 1535 (11th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Brocklesby v. United States, 753 F.2d 794 (9th Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Vandenplas v. City of Muskego, 753 F.2d 555 (7th Cir. 1985) (constitutional claim; verdict for defendant; affirmed)

Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Malcak v. Westchester Park District, 754 F.2d 239 (7th Cir. 1985); (constitutional claim; verdict for plaintiff; reversed)

Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985) (constitutional claim; verdict for plaintiff; affirmed)

Rocco v. Johns-Manville Corp., 754 F.2d 110 (3d Cir. 1985) (personal injury claim; verdict for plaintiff; affirmed)

Pepsi-Cola Metro. Bottling Co., Inc. v. Checkers, Inc., 754 F.2d 10 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

DeFranco v. Valley Forge Ins. Co., 754 F.2d 293 (8th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Abeshouse v. Ultragraphics, Inc., 754 F.2d 467 (2d Cir. 1985) (commercial claim; verdict for plaintiff; verdict reduced)

Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; verdict reduced)

Moore v. Boating Industry Associations, 754 F.2d 698 (7th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed after remittitur)

U.C. Castings Co. v. Knight, 754 F.2d 1363 (7th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Kelly v. Allied Corp., 755 F.2d 184 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Eyre v. McDonough Power Equipment, Inc., 755 F.2d 416 (5th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

Texoma AG-Products v. Hartford Accident and Indemnity Co., 755 F.2d 445 (5th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Brown by Brown v. Syntex Laboratories, Inc., 755 F.2d 668 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; reversed)

LeSavage v. White, 755 F.2d 814 (11th Cir. 1985) (constitutional claim; verdict for plaintiff; reversed in part)

Tibbs v. Great American Insurance Co., 755 F.2d 1370 (9th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Bright v. Firestone Tire & Rubber Co., 756 F.2d 19 (6th Cir. 1984) (personal injury claim; verdict for defendant; affirmed)

Federal Deposit Insurance Co. v. Hatmaker, 756 F.2d 34 (6th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Computer Identics Corp. v. Southern Pacific Co., 756 F.2d 200 (1st Cir. 1985) (commercial claim; verdict for defendant; affirmed)

Aldrich v. Thomson McKinnon Securities, Inc., 756 F.2d 243 (2d Cir. 1985) (commercial claim; verdict for plaintiff; verdict reduced)

Raftery v. Scott, 756 F.2d 335 (4th Cir. 1985) (miscellaneous claim; verdict for plaintiff; affirmed)

In re Corrugated Container Antitrust Litigation, 756 F.2d 411 (5th Cir. 1985) (commercial claim; verdict for defendant; affirmed)

W. B. Farms v. Fremont Nat. Bank & T. Co., 756 F.2d 663 (8th Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Deakle v. John Graham & Sons, 756 F.2d 821 (11th Cir. 1985) (personal injury claim; verdict for plaintiff; verdict reduced)

Chedd-Angier Production v. Omni Publications Int., 756 F.2d 930 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985) (miscellaneous claim; verdict for plaintiff; reversed in part)

Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985) (personal injury claim; verdict for plaintiff; evidence for punitive damages held sufficient but reversed and remanded for other errors)

Jamesbury Corp. v. Litton Industrial Products, Inc., 756 F.2d 1556 (Fed. Cir. 1985) (commercial claim; verdict for defendant; reversed)

Talliferro v. Augle, 757 F.2d 157 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; verdict reduced)

Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985) (constitutional claim; verdict for plaintiff; verdict reduced)

Air Et Chaleur, S.A. v. Janeway, 757 F.2d 489 (2d Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

Emery-Waterhouse Co. v. Rhode Island Hosp. Trust Nat. Bank, 757 F.2d 399 (1st Cir. 1985) (commercial claim; verdict for plaintiff; affirmed)

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No. 85-1053

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,
Petitioner,

vs.

METROMEDIA, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DONALD W. GIFFIN
(Counsel of Record)
CURTIS E. WOODS
MARK P. JOHNSON
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that on a challenge to the legal sufficiency of the evidence supporting Petitioner's state law fraud claim, and from its examination of all the evidence, Petitioner had failed to introduce sufficient evidence of an essential element of her fraud claim, requiring judgment for Respondent notwithstanding the verdict?

2. Did the Court of Appeals err in affirming the District Court's non-jury ruling for Respondent on sex discrimination and not adopting the jury's verdict on Petitioner's fraud claim, where the sex discrimination and fraud claims involved different legal and factual issues, different legal standards, and different evidence, and the jury found for Respondent on Petitioner's claim under the Equal Pay Act?

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No. 85-1053

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,
Petitioner,

vs.

METROMEDIA, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Petitioner Christine Craft was a television newscaster at KMBC-TV in Kansas City from January to August, 1981, when KMBC was owned by Respondent. Petitioner filed a three-count complaint against Respondent in January, 1983, alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (1981), the Equal Pay Act of 1963, 29 U.S.C. §206(d) (1978), and Missouri common law fraud.

After trial the jury rendered verdicts in Respondent's favor on the Equal Pay Act claim and in Petitioner's favor on the fraud claim. On October 31, 1983, the District Court found for Respondent on the Title VII claim and ordered a new trial on the fraud claim due to instructional errors and excessiveness of the damages awarded Petitioner by the jury. The District Court's opinion is reported at 572 F.Supp. 868 (W.D. Mo. 1983).

At the new trial the District Court submitted Petitioner's fraud claim to the jury, which found for Petitioner. On appeal, the Eighth Circuit Court of Appeals held that the District Court erred in submitting the claim to the jury, as Petitioner had failed to introduce substantial evidence that Respondent had committed a fraudulent act. The Court of Appeals affirmed the District Court's ruling that Respondent had not discriminated against Petitioner and the first jury's verdict for Respondent on the Equal Pay Act claim. The opinion of the Court of Appeals is reported at 766 F.2d 1205 (8th Cir. 1985).

Petitioner now seeks review of the Court of Appeals' ruling on her fraud claim under Missouri common law. She claims that her employer (Respondent) defrauded her when it criticized and attempted to improve her on-camera television appearance, allegedly contrary to its prior representations that it intended "no makeover or substantial changes" in her appearance.

Although Petitioner's claim was for affirmative misrepresentation, not for failure to disclose, the Petition before this Court demonstrates that Petitioner now modifies her claim by referring to Respondent's supposed failure to tell her about some aspects of its operation. (Petition, 4-5). Petitioner never asked the District Court to submit a failure to disclose claim and she did not raise that issue in the Court of Appeals.

The Court of Appeals, relying on Missouri case law, held that Petitioner defined what was meant by the "no makeover or substantial change" representations in pre-employment negotiations. 766 F.2d at 1220. (Appendix to Petition, 29-30). Petitioner admitted that her concern about appearance makeovers arose from her employment two years earlier at CBS Sports (Tr. II 91), which she testified she described to Respondent as CBS forcing her

to cut her hair severely and dye it from light brown to platinum blonde, shaving her eyebrows and dying them black (Tr. I 64-65), having plastic surgery performed to correct a drooping eyelid (Tr. II 118-119), and each time before Petitioner appeared on-camera, a CBS technician applying "heavy" makeup to her face. (Tr. I 66-68). Robert Hamilton, an attorney who represented Petitioner in pre-employment negotiations with Respondent, told Respondent's news director, Ridge Shannon, "[y]ou know what CBS did to Christine. They tried to make her into something she was not. They tried to change her . . ." (Tr. III 45). In Petitioner's presence, Hamilton told Shannon that when Petitioner was at CBS, ". . . they really made an effort to fundamentally change her appearance, and she doesn't want to go through that." (Tr. III 11).

In her Statement of the Case, Petitioner opines that when she worked for Respondent, management evinced a " 'relentless' obsession" with her appearance. However, the Court of Appeals properly held that Respondent's acts during her employment did not substantiate her claim that the representation was false when made. 766 F.2d at 1219-21 & n. 17. (Appendix, 27-32). On only one out of more than 200 on-camera appearances did anyone but Petitioner apply her makeup. (Tr. II 117-18). Respondent never criticized Petitioner about her hair. Petitioner admitted that news director Shannon's comments about the asymmetry of her eyes and face paralleled an evaluation made by her plastic surgeon two years before. (Tr. II 118-19). She met with Respondent's consultant no more than three to five times during her eight months of employment, and those meetings for the most part dealt with the mechanics and technical aspects of newscasts, not appearance. Not until two weeks before her resignation was she told to wear specific items of clothing—which

Petitioner admits were provided to her at no cost and to which she did not object. (Tr. II 38, V 145; Pl. Ex. 163). Thus, as the Court of Appeals held, Petitioner's own evidence fails to support her claim that her appearance was fundamentally changed.[1]

In addition, Petitioner's Statement of the Case completely ignores the adverse results of audience research which was conducted several months into her tenure with Respondent.[2] It is uncontradicted that the audience response to Petitioner's performance and appearance was overwhelmingly negative. Because of the May, 1981 research results all offhand references to Petitioner's California background ceased and she received a clothing calendar to improve her on-camera appearance. (Tr. II 26, 127).

In August, 1981 Respondent received the final results of a telephone survey conducted in June and July of 1981. Again, Petitioner was viewed poorly by the audience in almost all aspects of her performance. On August 14, 1981 Respondent's news director informed Petitioner of the results and of the station's decision to reassign her from the co-anchor position (at no loss in pay) because of the

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1. The Court of Appeals held:

> The ultimate measure of the representation's truth or falsity is what Craft could reasonably have understood KMBC to have promised. She testified that a "makeover" was "changing someone's appearance" and that she had believed KMBC didn't want to change anything about her. This position, however, is not totally consistent with the "*substantial* changes" language submitted in the jury instruction. It seems plain, thus, that a jury could not have reasonably measured the falsity of KMBC's representation against Craft's subjective view of a "makeover" as any change at all.

766 F.2d at 1220 (Appendix, 29).

2. Ignoring the audience research evidence was the most glaring example of Petitioner's selective view of the evidence, as portrayed in her Statement of the Case.

research. Petitioner chose to quit, return to her previous employer, a television station in Santa Barbara, California, and file suit.

REASONS FOR DENYING THE WRIT

I. IN THE DECISION BELOW THE COURT OF APPEALS DETERMINED THE APPROPRIATE STANDARD OF REVIEW AND APPLIED THAT STANDARD PROPERLY IN HOLDING THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE DISTRICT COURT'S SUBMISSION OF PETITIONER'S COMMON LAW FRAUD CLAIM TO THE JURY.

Under the guise of the Seventh Amendment, Petitioner attacks the Eighth Circuit for comprehensively reviewing the evidence to determine its legal sufficiency. A review of the Eighth Circuit opinion manifests the Court's understanding of and allegience to the appropriate standard to be utilized by an appellate court in reviewing a claim based on Missouri law. The writ should be denied, for Petitioner has raised no constitutional or substantial federal question warranting review by the Supreme Court, nor has she demonstrated a conflict among the Circuits on a significant issue.

Petitioner ignores settled law requiring comprehensive review of the evidence when an appellate court is confronted with a challenge to the legal sufficiency of the evidence. This was not a case of appellate fact-finding, as Petitioner asserts, but a case involving a thorough consideration of all the evidence for legal sufficiency. The Courts of Appeals unanimously agree that assessment of the legal sufficiency of the evidence is for the court, not a jury. *See, e.g., Holter v. Moore & Co.*, 702 F.2d 854, 855 (10th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 347

(1983); *U.S. v. Bucon Construction Co.*, 430 F.2d 420, 423 (5th Cir. 1970). *See also*, 9 C. Wright & A. Miller, *Federal Practice and Procedure*, ¶2524, at 541 (1971).

Under both Missouri and federal law, a plaintiff must introduce substantial evidence to support the submission of a claim to the jury. *Boeing Co. v. Shipman*, 411 F.2d 365, 373-77 (5th Cir. 1969) (*en banc*); *Rowe v. Farmers Insurance Co., Inc.*, 699 S.W.2d 423, 429 (Mo. 1985) (*en banc*) (Blackmar, J., concurring) ("Missouri . . . disclaims the *scintilla* rule and holds that every element of a case must be established by substantial evidence."); *Jones v. Garney Plumbing Co.*, 409 S.W.2d 637, 645 (Mo. 1966). The Court of Appeals thus applied the proper standard in holding that absent substantial evidence of an element of her claim, Petitioner's claim must fail. 766 F.2d at 1218 (Appendix, 25); *Bauer v. Adams*, 550 S.W.2d 850, 853 (Mo. App. 1977). The Court of Appeals' obligation was to examine the entire record, consisting of over twenty volumes of transcript and dozens of exhibits, to determine whether, under controlling Missouri law, Petitioner introduced substantial evidence of each element of her fraud claim. As the Court of Appeals did in this case, the Missouri courts have engaged in precisely such an analysis of the evidence in fraud cases and often have granted judgment for defendants notwithstanding the verdict. *Grosser v. Kandel-Iken Builders, Inc.*, 647 S.W.2d 911 (Mo. App. 1983); *Bauer v. Adams; Klecker v. Sutton*, 523 S.W.2d 558 (Mo. App. 1975).

The verdict-directing instruction requested by Petitioner and submitted to the jury contained the representation by Respondent that it intended "no makeover or substantial changes in [Petitioner's] appearance." As the Court of Appeals properly held, Missouri law required Petitioner to prove that Respondent did not intend to perform consistently with those words at the time they were ut-

tered. 766 F.2d at 1219. (Appendix, 27). In examining the evidence to determine whether Petitioner introduced substantial evidence of intent, the Court followed Missouri law in holding that Petitioner defined the representation by her detailed discussion of CBS:

> [t]he language of an alleged misrepresentation must be considered in light of the background in which the statements were made and the context in which the words were used. [*Toenjes v. L. J. McNeary Construction Co.*, 406 S.W.2d 101, 106 (Mo. App. 1966)]. KMBC's statements to Craft were made in response to her expressions of concern about her experience with CBS, where the network had required that her hair be cropped and dyed blond, her eyebrows shaved and dyed black, and heavy makeup applied.

766 F.2d at 1220. (Appendix, 30). Having defined the representations, Petitioner could not ascribe an even broader meaning to them at the time of trial, cf. *Kawin v. Chrysler Corp.*, 636 S.W.2d 40, 43 (Mo. 1982) (*en banc*), nor can she do so before this Court.

According to Petitioner, any claim should go to the jury, regardless of how strained the necessary inferences. Without citation to the record, and no basis in the evidence, she asserts that Respondent had a ". . . conceded intent to change Craft's appearance . . ." (Petition, 18). The Court of Appeals correctly rejected that conclusion, as Respondent never conceded such intent, and the inferences Petitioner asserted did not reasonably point toward fraudulent intent. 766 F.2d at 1220-21. (Appendix, 30-32). The Court of Appeals properly followed Missouri law that evidence in a fraud case which is susceptible of conflicting inferences must be viewed as supporting honesty and good faith, not perversity or bad faith. *Macon-Atlanta State Bank v. Gall*, 666 S.W.2d 934, 941 (Mo. App.

1984). Petitioner's strained analysis of the inferences could not by itself raise a jury question, as the Court of Appeals held in determining and applying the appropriate standard of review.

Finally, Petitioner accuses all of the Circuits of routinely applying improper standards of appellate review. She bases that accusation solely upon the Eighth Circuit's decision in her case and an inherently suspect "statistical analysis" of each Circuit's reversal rate over only one year. From her solely quantitative analysis, Petitioner concludes that the appellate courts have usurped every litigant's right to a jury trial every time a reversal was grounded on a failure to make a submissible case.

One cannot respond to an "analysis" so totally lacking in scientific basis, as it is dependent on an unexplained methodology grounded on subjective opinion as to the grounds for reversal, and excludes the large number of unreported decisions or summary dispositions—which are almost always affirmances—and decisions which do not reach the issue of sufficiency of the evidence. Despite these glaring defects in her "statistics," Petitioner concludes that a certain rate of reversal proves a constitutional violation. This "study" lends no support to Petitioner's claim that the Circuits only pay "lip service" to the Seventh Amendment and violate its mandate flagrantly.[3] (Petition,

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3. In addition to accusing it of usurping her right to jury trial, Petitioner claims the Eighth Circuit was motivated by prejudice against her. She accuses the Eighth Circuit of "duplicity" (Petition, 22 n. 16), "single-minded bias" (Petition, 18 n. 14), conducting "blatantly false" fact-finding (Petition, 20), and evincing an anti-female attitude. (Petition, 21). In like fashion, on appeal to the Eighth Circuit, Petitioner accused the District Court of "preconceived bias" against her. (Brief of Appellee/Cross-Appellant, at 27 n. 9). Petitioner's statistics with respect to other Circuits' usurpation of litigants' jury trial rights are not ascribed any motive, sex discrimination or otherwise, nor does Petitioner refer to any scholarly research supporting her conclusions about these "statistics."

15). With respect to the cause before this Court, however, there is an opinion and a record which disproves Petitioner's claim.

Petitioner thus presents no constitutional issue, no substantial federal question, nor any conflict among the decisions of the various Courts of Appeals. The Petition should be denied.

II. THE COURT OF APPEALS DETERMINED AND PROPERLY APPLIED THE APPROPRIATE STANDARD OF REVIEW OF THE DISTRICT COURT'S RULINGS ON PETITIONER'S TITLE VII CLAIM, AND PROPERLY FOUND THAT THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT CLEARLY ERRONEOUS.

After the August, 1983 trial in Kansas City, the District Court found against Petitioner on her claim of sex discrimination under Title VII. The Court of Appeals correctly held that it could reverse that ruling only if clearly erroneous under Rule 52(a), Fed. R. Civ. P. After examining the evidence, the Court of Appeals properly found that the District Court's findings were not clearly erroneous.

Petitioner now claims that in rendering its decision on the Title VII count, the District Court should have followed the jury's findings arising out of the fraud count. (Petition, 21-24). The Court of Appeals did not address this point and therefore the point is not in a posture for consideration by this Court on a writ of certiorari. *Brandon v. Holt*, ... U.S. ....., 105 S.Ct. 873, 879 n. 25 (1985).

Even if the point is properly before this Court, Petitioner overlooks the fact that the jury found for Respon-

dent on the Equal Pay Act count, conclusively undermining her assertion that the jury found all of the factual issues in her favor. Further, the sex discrimination and fraud issues presented to the District Court and the jury, respectively, did not "overlap," Petitioner's assertion to the contrary notwithstanding. The "critical factual issues" were not "largely the same," as Petitioner asserts. (Petition, 22). The jury ruled on fraud while the District Court faced the issue of discrimination. As this Court recently held, in a Title VII case, discrimination *vel non* is a factual issue to be decided solely by the trial judge. *Pullman-Standard v. Swint*, 456 U.S. 273, 285-90 (1982).

The respective burdens of proof were different, the Title VII claim being controlled by the federal shifting burden of proof analysis outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 440 U.S. 248 (1981), while the burden of proof on the fraud claim was governed by Missouri law, outlined, for example, in *Bauer v. Adams*, 550 S.W.2d at 852-53. In addition, the damages recoverable were different, so the evidence relevant to damages under Title VII and the common law fraud claim also differed. Section 706(g) of Title VII allows for both legal and equitable relief, but not for compensatory or punitive damages, 42 U.S.C. §2000e-5(g), while on a Missouri fraud claim, actual and punitive damages may be recovered. *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483 (Mo. 1966) (*en banc*).

In the instant case, the evidence before the factfinders was also different. The District Court heard and considered evidence which the jury did not hear, and heard lengthy offers of proof which were never presented to the jury. The District Court's decision was based on

evidence demonstrating the absence of discriminatory distinctions between males and females at Respondent's station while Petitioner was employed. On the other hand, the jury's resolution of the fraud claim was based on specific conversations between Petitioner and Respondent's station manager and news director before Petitioner was hired.

The two cases cited by Petitioner are inapposite, as in those cases the judge and jury decided identical claims based on identical evidence. *Lincoln v. Board of Regents of Univ. System,* 697 F.2d 928 (11th Cir. 1983) (race discrimination under Title VII and 42 U.S.C. §1981); *Caputo v. U.S. Lines Co.,* 311 F.2d 413 (2d Cir. 1963) (liability for personal injury).

Finally, Petitioner asserts that her claim as to the binding effect of the jury verdict is also before the Court in *Bellissimo v. Westinghouse Electric Corporation,* 764 F.2d 175 (3d Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3346 (U.S. November 5, 1985) (No. 85-786). Petitioner is incorrect, for in *Bellissimo* the legal and factual issues tried by the judge and jury were identical, *i.e.,* whether Ms. Bellissimo was discriminated against because of her sex in terms of the salary she was paid (the District Court considered the claim under Title VII, and the jury considered the claim under the Equal Pay Act). (Petition for Writ of Certiorari, No. 85-786, at 26-36). In Petitioner's case, as demonstrated above, the judge and jury issues were in no way identical.

Petitioner therefore presents no substantial federal question, no constitutional issue, nor a dispute among the decisions of the Courts of Appeals. The Petition should be denied.

CONCLUSION

For the above reasons Respondent respectfully submits that the Petition for a Writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

DONALD W. GIFFIN
(Counsel of Record)
CURTIS E. WOODS
MARK P. JOHNSON
SPENCER, FANE, BRITT & BROWNE
1000 Power & Light Building
106 West 14th Street
Kansas City, Missouri 64105
(816) 474-8100
Attorneys for Respondent

5

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No. 85-1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE A. CRAFT,

Petitioner,

—vs.—

METROMEDIA, INC.,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dennis E. Egan
Counsel of Record
Missouri I.D. No. 27499
POPHAM, CONWAY, SWEENY, FREMONT
& BUNDSCHU, P.C.
1300 Commerce Trust Building
922 Walnut Street
Kansas City, Missouri 64106
(816) 221-2288

Attorneys for Petitioner

5 PP

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Shoultz v. Monfort of Colorado, Inc. No. 84-1747 (petition for certiorari pending) 3

Petitioner's Reply Brief

Petitioner urges that the Court request the views of the United States with regard to this case. The petition describes in detail the general practice of the courts of appeals of reversing 45% of all civil jury verdicts challenged on evidentiary grounds. (Petition, pp. 11-16). Respondent acknowledges that such a pattern of reversals, if unexplained, would indicate that the circuit courts are "routinely applying improper standards of appellate review." (Br. Opp.p8). The analysis set forth in the petition rests on all the appellate decisions reported in the last year; although respondent asserts that the evaluation of these cases involves some subjective judgments, respondent does not in fact dispute the evaluation of any of the 233 cases summarized in the petition. (Br. Opp. p.8; Pet. App. 107a-128a).

The role of the appellate courts in reversing civil jury verdicts affects the interests of the United States in a variety of types of cases. Actions filed by the EEOC under the Age Discrimination Act are tried before civil juries, as are constitutional claims against individual federal officials; appellate reversal rates are in practice highest for discrimination and constitutional cases. The extent to which the appellate courts may be exceeding their authority under the Seventh Amendment is a matter of broad importance similar in scope to the constitutional issues regarding which the Court has requested the Solicitor's views in the past. See, e.g. Ariyoshi v. Robinson, No. 85-406 (Fourteenth Amendment); (Polo Fashions, Inc., v. Stock Buyers, No. 85-455 (Sixth Amendment right to counsel); Liphete v. Merritt Stierheim, No. 84-1287 (Equal Protection);

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit. In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

Respectfully submitted,

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27499
POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust Building
922 Walnut Street
Kansas City, Missouri 64106
(816) 221-2288

Attorneys for Petitioner

85-1053

No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTINE CRAFT,

Petitioner,

—v—

METROMEDIA, INC.,

Respondent.

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND AND EQUAL RIGHTS ADVOCATES AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MARSHA LEVICK
EMILY J. SPITZER
(Counsel of Record)
NOW Legal Defense and
Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6635

Attorneys for Amici Curiae

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INTERESTS OF THE AMICI CURIAE*

The NOW Legal Defense and Education Fund and Equal Rights Advocates are organizations dedicated to securing equal rights for women before the law.**

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case as set forth in the brief of Petitioner.

SUMMARY OF ARGUMENT

This Court should grant certiorari for several reasons. The decision of the Court of Appeals to reverse the finding of fraud in favor of Craft denied Craft of her

* Counsel for both parties have consented to the filing of this brief amici curiae. The original consent letters are being filed with the Clerk of the Court.

** Descriptions of these organizations appear in the Appendix to this brief.

constitutional rights as guaranteed by the Seventh Amendment to the United States Constitution. In ruling improperly that the fraud case was insufficient for submission to the jury, and in engaging in its own fact-finding to reach that conclusion, the Court of Appeals denied Craft her right to a jury trial.

The Eighth Circuit also re-examined the evidence adduced at trial in a manner contrary to the dictates of the Seventh Amendment. The Seventh Amendment requires that an appellate court review the facts submitted to a jury in conformity with the common law. The common law mandates that conflicts in the evidence be resolved in favor of Craft. The Eighth Circuit failed to conform to that mandate and thus violated Craft's Seventh Amendment rights.

This case presents legal issues of far-reaching importance. In rejecting the

factual findings of the jury, the Court of Appeals has substituted its own improper factual determinations which both are based upon and serve to perpetuate stereotyped images of women in the media.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION THAT THE FRAUD CASE WAS IMPROPERLY SUBMITTED TO THE JURY DENIED CRAFT OF HER CONSTITUTIONAL RIGHT TO A JURY TRIAL

The Court of Appeals for the Eighth Circuit improperly engaged in its own fact-finding to arrive at its remarkable decision that Christine Craft ("Craft") had failed to put forward sufficient evidence against Metromedia, Inc. ("Metromedia") to have her claim submitted to a jury. The Circuit Court's decision is particularly remarkable in light of the fact that not one but two separate juries had previously determined that Metromedia was liable to Craft for fraud.

The factual question presented by the fraud case was whether Metromedia, when it told Craft that it would not force her to change her appearance, in fact did intend to do just that. The jury, whose verdict was reversed, answered that factual question in Craft's favor. A prior jury, whose findings were rejected by the District Court, also reached the same conclusion. The Court of Appeals decided, however, to usurp the role of the jury by engaging in its own factfinding to reach the opposite conclusion.

The Seventh Amendment to the United States Constitution states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment, as explained in Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1983), a case relied on by the Court of Appeals, thus guarantees the right to a jury trial. A party will be denied the right to have a case submitted to a jury only if there can be but one conclusion based upon the evidence. Id. Thereafter, an appellate court may usurp the jury's role by determining that the case should never have been submitted only when there is a complete absence of probative facts to support the jury's verdict. Id. In reaching that conclusion the appellate court may review all of the evidence, but if there are relevant factual conflicts, the only correct factfinder is the jury. The appellate court may not substitute its own set of "facts" when reviewing the evidence for submissibility. Thus, in Tennant v. Peoria, 321 U.S. 29, 35

(1943), quoted in Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 114-115 (1963), the Supreme Court stated:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weights the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (cases omitted)...[T]hat conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. (emphasis added)

Similarly, in Lavender v. Kurn, 327 U.S. 645 (1945), the Supreme Court, reversing the Supreme Court of Missouri, which held that there was no substantial evidence of negligence to support the submission of the case to the jury, stated:

> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

See also, Atlantic and Court Stevedores Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962); Dick v. New York Life Insurance Co., 359 U.S. 437 (1959); Easley v. Empire

Inc., 757 F.2d 923, 928 (8th Cir. 1985); Setser v. Novack Inn. Co., 638 F.2d 1137 (1981); Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976)

An appellate court, thus, may reverse the decision of a trial court to submit a case to the jury only if all of the evidence pointed one way and was susceptible of no reasonable inferences sustaining the position of the plaintiff. Crues v. KFC Corp., 729 F.2d 1145, 1148 (Cir. 1984).

In the instant case the Court of Appeals acknowledged that it was obligated to resolve direct factual conflicts in favor of Craft, that it had to accept as true all facts supporting Craft which the evidence tended to prove, that it must give Craft the benefit of all reasonable inferences and that it must refuse to reverse the jury if the evidence so viewed

would allow reasonable jurors to differ as to the conclusions that could be drawn. Slip Opinion at 23, 24. However, the Court of Appeals merely gave lip-service to the appropriate standard while engaging in a wholesale assault on the jury's function. Rather than viewing the evidence in a light most favorable to Craft, the Eighth Circuit opted to view the evidence in Metromedia's favor to reach its decision that Craft's case should never have been submitted to the jury.

The Petition for Rehearing by the Court of Appeals of Craft (submitted by Petitioner in her Appendix at pages A75 - A97) enumerates the many instances in which the Court of Appeals ignored much of the evidence on which the jury based its factual conclusions, and substituted factual conclusions of its own. Those facts will not be enumerated in full here,

other than certain of the more salient ones.

As Craft testified, at the time of her audition and interview, there was no discussion of her "getting help" with her clothing and makeup. (A81) Indeed she made it clear that she would not be interested in the job if Metromedia "wanted someone who looked different than the person on the [audition] tape." (A82). Craft was assured that Metromedia liked her appearance and had no intention of changing either her hair, make up or clothing. (A83) Replogle, in testimony, admitted that management told Craft that they did not intend to make her over, redo her or change her fundamental appearance. (A84) Shannon testified that at no time was Craft told that she would be subject to the dictates of the Media Consultants. (A85). Bob Hamilton, Craft's negotiator,

repeatedly made it clear to Replogle and Shannon that there was to be no makeover, no changing of Craft into something she was not. (A84)

Crucially, management never told Craft of its always-extant belief that appearance was the number one criterion for a television newsperson -- despite her informing them of her reasonable desire to be "a journalist, not a beauty queen." (A85) Direct and circumstantial evidence clearly showed that, while Metromedia was making representations that they understood Craft's concern and that they had no intention of changing her general appearance, these representations were false. (A85) The Media Consultants, whose advice was firmly relied on by Metromedia, made negative comments on Craft's appearance, and suggestions about changing it immediately after seeing the audition tapes

(A86) and before Craft commenced work. This fact was kept from Craft on Metromedia's instructions, (A86), although they intended to work on her "problems," using the same "intrusive control" methods used in the past with other on air personnel. (A87) Shannon admitted to criticizing Craft's appearance and to beginning the work on her clothing and appearance "from day one," despite the fact that no research had been done on it. (A88) From the beginning to the end of her employment, appearance was focused on "continuously". (A89)

Based on the foregoing it cannot be argued that the evidence, as detailed to the jury, is not susceptible of a reasonable inference sustaining Craft's position. Indeed, the evidence establishes all of the requisite elements for a finding of fraud. Thus, the case was properly

submitted to the jury, and the Eighth Circuit's ruling to the contrary denied Craft of her Seventh Amendment right to a jury trial by her peers.[1]

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[1] Although only the second jury's verdict is specifically the subject of this appeal, the existence of two jury verdicts in favor of Craft is important in highlighting the extent to which the Court of Appeals has usurped the constitutionally mandated role of the jury as factfinder.

The first jury awarded actual damages of $375,000 and punitive damages of $125,000 to Craft, but a new trial was ordered by Judge Stevens "because of the excessive verdict attributable to incomplete instruction of the jury and to incessant and overwhelming trial publicity." Craft v. Metromedia, Inc., 572 F. Supp 868, 882 (1983). The second jury was correctly instructed and sequestered "to assure both parties an impartial jury," 572 F. Supp 882. To further "ensure the integrity of the jury", 572 F., Supp 882, Judge Stevens ordered a retrial by a jury of twelve to "reduce the risk that one or two headstrong jurors might unduly influence the jury" and to "increase the chances that reason will prevail over passion." The second trial was also moved to a new venue, in an attempt to remove the case from an area where jurors would have been most heavily bombarded by pre-trial publicity. This second jury, assembled as a result of Judge Steven's correct emphasis on the importance of the jury, again found

II. THE COURT OF APPEALS' IMPROPER RE-EXAMINATION OF THE FACTS VIOLATES THE SEVENTH AMENDMENT

The Eighth Circuit improperly re-examined facts tried by the jury and in so doing violated another important precept of the Seventh Amendment which requires that "no fact tried by a jury... shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The Eighth Circuit concluded that "there is insufficient evidence for a reasonable jury to have found that KMBC at the time it made its representation contemplated such extensive measures as to her appearance so as to make false its statements that it intended 'no makeover or substantial changes.'" In effect, the Eighth Circuit entered a

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in Ms. Craft's favor. This unimpeached jury verdict should stand. For this reason, Amici submit that the petition for certiorari should be granted.

judgment notwithstanding the verdict and did so based upon its own unconstitutional fact-finding.

Judge Stevens in the District Court heard all the evidence firsthand and on no less than six occasions before, during and after the trial considered and rejected motions which would have wrested the case from the jury. Judge Stevens correctly denied the Defendant's motion for judgment notwithstanding the verdict since, under the common law it could have been granted "only if the motion for directed verdict should have been granted." Walker v. KFC Corp., 515 F. Supp 612, 615 (S.D. Cal. 1981). The Defendant's prior motion for a directed verdict had been denied after extensive post-trial briefing and argument, since it did not satisfy the test set forth in Walker:

> Simply stated ... whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.

Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970). Judge Stevens correctly adhered to common law rules in holding that a directed verdict was inappropriate.

The Court of Appeals, however, effectively entered a judgment notwithstanding the verdict based upon a reexamination of the facts which failed to heed he teachings of the common law and thus violated the Seventh Amendment.

III. THIS CASE PRESENTS LEGAL ISSUES OF FAR-REACHING IMPORTANCE SINCE THE COURT OF APPEALS DECISION ACCEPTS AND PERPETUATES STEREOTYPED IMAGES OF WOMEN IN THE MEDIA

Employment decisions, although they may be based on subjective criteria, may not be based upon stereotyped assumptions

about women. Hopkins v. Price Waterhouse, ___ F. Supp. ___ (D.D.C. September 20, 1985). Reliance on stereotypes in employment decisions violates Title VII of the Civil Rights Act of 1964. Id.

> Whenever a promotion system relies on highly subjective evaluations of candidates by individuals or panels dominated by members of a different sex, there is ground for concern that such high level subjectivity subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice. Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976), cert. denied, 434 U.S. 822 (1977). Such procedures must be closely scrutinized because of their capacity for masking unlawful bias. Davis v. Califano, 613 F.2d 957, 965 (D.C. Cir. 1979). This scrutiny comprehends examination of evaluation procedures that permit or give effect to sexual stereotyping.

Hopkins v. Price Waterhouse, ___ F. Supp. ___ (Slip. Op. 21) (D.D.C. 1985).

In the instant case employment decisions which were made about Craft were

highly subjective, and many of those decisions were based upon stereotyped views of the role of women in the broadcast media. Indeed, the central issue in the fraud count is rooted in stereotyped notions concerning the so-called proper appearance of women on television, and the all too prevalent practice of judging women in the media more on their appearance than on their merit.

Two juries, composed of a total of eighteen people, carefully scrutinized the employment practices of Metromedia and, on both occasions, found Metromedia liable to Craft for fraud. The Eighth Cicuit, however, refused to accept the factual findings of those eighteen people. Instead, the Eighth Circuit embarked on its own fact-finding mission and reached a conclusion reminiscent of those stereotypes by rejecting the juries' findings that

Metromedia's attempt to change Craft's appearance was fraud. The Eighth Circuit opinion suggests that the appearance of a woman in the media is of such importance to her job qualifications that imposed changes in her appearance can never be actionable fraud. Judicial tolerance of such stereotyping runs counter to nearly two decades of intensive efforts to eradicate stereotypes, and this Court should grant certiorari to prevent the reinforcement of such stereotypes.

A. The Reliance On Stereotypes Perpetuates The Under-Employment of Women in the Media

Television stations and networks have historically employed women in limited numbers and in limited capacities. This exclusion of women from significant and highly visible 'on air' positions profoundly effects societal attitudes towards the status and role of women. The importance

of television in shaping public opinion was expressly acknowledged by the United States Commission on Civil Rights in its report Window Dressing on the Set: Women and Minorities in Television (1977) (hereinafter Window Dressing):

> [Television] confers status on those individuals and groups it selects for placement in the public eye, telling the viewer who and what is important to know about, think about, have feelings about. Those who are made visible through television become worthy of attention and concern; those who television ignores remain invisible.

Window Dressing, at 1.

The under-representation and under-utilization of women by the broadcast industry has been well-documented. In Window Dressing, the Civil Rights Commission found, in a study of one particular network's news programs based on 1974 data, that male correspondents outnumbered female correspondents nearly eight to one. Id. at

51. The Commission also found that women and minorities rarely covered crucial national news stories, but instead were assigned topics considered to be of particular interest to women and minorities, and which were themselves infrequently covered. Id. When the Commission updated its report in 1979, it found no statistical improvement in the intervening years: There were still approximately eight male news correspondents for every female news correspondent. U.S. Commission on Civil Rights, Window Dressing: An Update (1979).

Most recently, a 1984 study undertaken by the Women's Media Project of the NOW Legal Defense and Education Fund confirmed the abysmal progress women have made in network news. Women's Media Project, The Media Project Study (1984). The study revealed that, in the last ten years, the

number of women reporting the news on network television had increased by only three tenths of one percent. Id.

The low representation of women in the media stems not only from outright discrimination but also from the fact that men and women are judged differently for the same jobs. Recent academic studies have corroborated what was always intuitively obvious: society holds very different notions about what men an women are and should be. Men are seen as independent, active and logical; women are seen as dependent, passive and illogical. L. Broverman, S. Vogel, D. Broverman, P. Clarkson, P. Rosenkrantz, Sex Role Stereotypes: A Current Appraisal, 28 Journal of Social Issues 59 (1972). Researchers have also confirmed that women are described and judged by their physical appearances to a much greater extent than men. P. Schwartz,

The Social Psychology of Female Psychology, paper presented at the Conference for New Directions for Research on the Psychology of Women, Madison, Wisconsin 1975. That tendency pervades media employment decisions.

While both man and women are restricted by these preconceptions and expectations, women suffer the greater burden. The characteristics expected of them are traits traditionally devalued by society; yet failure to live up to them leads to accusations of "unladylike" behavior resulting in further prejudicial consequences. See W. Mischel, Sex Bias In The Evaluation of Professional Achievements, 66 Journal of Educational Psychology 157 (1974).

The Court of Appeals, in rejecting the findings of two juries that Metromedia had defrauded Craft by trying to make her

over despite their promises to the contrary, has given license to the media to continue judging women on their appearance.[2] Unless this Court accepts certiorari there is a great risk that this historical stereotyping will be continued.

B. The Unique Power and Influence of Television Requires That Stereotyped Images Be Avoided In Its Employment Practices

The unparalleled power and influence of television to mold public opinion and attitudes is unquestioned. Its unique position as a communicator of ideas and information has been acknowledged time and

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[2] This improper decision by the Eighth Circuit to take on the role of factfinder regarding the fraud count is particularly ironic in light of the fact that the Eighth Circuit found it unnecessary to disturb any of the factual findings made by the trial court judge in connection with the dismissal of Craft's Title VII count in the first trial. The Eighth Circuit mistakenly seems to attach more credibility to factfinding by judges than it does to factfinding by juries.

again in decisions of the Supreme Court, recognizing the need to apply special regulatory principles to the industry to ensure that its obligation as a "public trustee" is fulfilled. See, e.g., F.C.C. v. League of Women Voters of California, 82 L. Ed. 2d 278, 284 (1984); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); N.A.A.C.P. v. F.P.C., 425 U.S. 662 (1976).

Congress has likewise recognized the peculiar nature of the broadcast industry, and has consistently acted to ensure the broadest possible participation and access to the electronic airwaves. The Communications Act of 1934 specifically requires broadcast media licensees to act in the public interest, 47 U.S.C. § 309(a) (1984).

While much of the FCC's regulation of the industry has been geared towards

ensuring broad representation of a wide spectrum of community interests in actual programming, see, e.g., F.C.C. v. League of Women Voters, supra, the employment practices of the industry have been subjected to similarly rigorous scrutiny. Consistent with the obligation to operate in the public interest, the employment practices of a licensee have been considered equally relevant to its application for a broadcast license as consideration of its programming record. As the F.C.C. noted in In the Matter of Petition for Rulemaking to Require Broadcast Licensers to Show Nondiscrimination in their Employment Practices, F.C.C. 68-702, 13 F.C.C.2d 766 (1968):

> Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal

> opportunity in employment in that industry could therefor contribute significantly toward reducing and ending discrimination in other industries.

13 F.C.C.2d at 771. Cf. 47 U.S.C. § 309 (i) (A) (1984).

The unique responsibility of the broadcast industry to serve the public interest carries with it a special obligation to avoid rigorously discrimination in its employment practices. By virtue of its enormous power to influence public opinion, the industry must recognize that the images it presents, both in its selection of programming and its selection of employees, are particularly determinative of the ultimate contours of that public opinion. See, e.g., S. Pingree, The Effect of Nonsexist Television Commercials and Perceptions of Reality on Children's Attitudes about Women, 2 Psychology of Women Quarterly 262 (1974). Reliance on

sex-based stereotypes regarding television newscasters will merely serve to perpetuate, rather than eradicate, sex discrimination in our society.

The Court of Appeals, in rejecting the findings of two juries, has substituted a judgment upholding upon stereotyped attitudes towards women in the media, and thus has served to promote the stereotyped notions which it is vital to eradicate. Overturning a jury's factfinding is always drastic; it is particularly suspect when two juries have reached the same conclusions and when the jury findings have rejected the stereotyped notions which we as a society are fighting so hard to reject.

CONCLUSION

Based upon the foregoing, amici curiae respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Eighth Circuit.

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New York, New York

Respectfully submitted,

Marsha Levick
Emily J. Spitzer
NOW Legal Defense and Education Fund
99 Hudson Street
New York, New York 10013

Attorneys for Amici Curiae*

*Attorneys for amici curiae gratefully acknowledge the assistance in the preparation of this brief provided by Alison Wetherfield.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and education services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF has participated as amicus curiae in numerous employment cases before this Court, and participated as amicus curiae in this case before the Eighth Circuit.

Equal Rights Advocates ("ERA") is a non profit public interest law firm specializing in the area of sex discrimination. For over eleven years the law firm has been involved in all areas of law which affect equality between the sexes.

ERA is particularly concerned with

issues of discrimination in the work place because economic equality is fundamental to women's ability to become full and equal participants in society. The majority of cases litigated by ERA have challenged discriminatory employment practices or laws which impede women's employment opportunities. Pursuant to its concerns, ERA has participated in numerous cases in both the federal and state courts where issues concerning the rights of women have been raised.